

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 349

REUBEN WELLER, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

**IN ERROR TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF
NEW YORK, STATE OF NEW YORK**

FILED APRIL 2, 1924

(30,240)



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[fol. 1] **IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, FIRST DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against

REUBEN WELLER, Defendant, Appellant

STATEMENT UNDER RULE 234

This was a criminal action brought on behalf of the People of the State of New York against the defendant, Reuben Weller, upon an information filed in the Court of Special Sessions of the City of New York on the 27th day of November, 1922. The defendant pleaded thereto on the 7th day of December, 1922. The names of the original parties are as stated in the above title. The People was represented by the Hon. Joab H. Banton, District Attorney, New York, and the defendant was represented by Messrs. Guggenheimer, Untermeyer and Marshall. There has been no change of attorneys herein.

[fol. 2] **IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,
COUNTY OF NEW YORK**

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
against

REUBEN WELLER, Defendant

NOTICE OF APPEAL

SIRS: Please take notice that the above-named defendant, Reuben Weller, hereby appeals to the Appellate Division of the Supreme Court, held in and for the First Judicial Department, from the judgment of conviction rendered against the above-named defendant in the above-named court on the 16th day of February, 1923, convicting the defendant of a violation of Sections 168 and 169 of the General Business Law, added by Chapter 590 of the Laws of 1922, and imposing a fine of \$25 and upon the failure to pay said fine that the defendant serve five (5) days in the penitentiary of the County of New York, and from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, February 16, 1923.

Yours, &c., Guggenheimer, Untermeyer & Marshall, Attorneys for Defendant.

Office and Post Office Address, 120 Broadway, Borough of Manhattan, New York City.

[fol. 3] To Hon. Joab H. Banton, District Attorney, New York County. — — —, Clerk of the Court of Special Sessions.

IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

[Title omitted]

INFORMATION

Be it remembered that I, Joab H. Banton, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of unlawfully reselling tickets to a theatre and place of amusement, committed as follows:

The said defendant on the 26th day of October, 1922, at The City of New York, in the County of New York, unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement and did resell to one John Cunniff, a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license thereof from the Comptroller of the State of New York as required by law.

Joab H. Banton, District Attorney.

[fol. 4]

IN COURT OF SPECIAL SESSIONS

[Title omitted]

JUDGMENT APPEALED FROM

It is thereupon ordered and adjudged by the Court, that the said Reuben Weller for the misdemeanor aforesaid, whereof he is convicted, pay a fine of Twenty-five Dollars. And it is further ordered that he stand committed to the custody of the Keeper of the City Prison of The City of New York until the said fine be paid, but not exceed five days.

A true extract from the minutes.

Joseph F. Moss, Jr., Clerk of Court.

[fol. 5] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

[Title omitted]

Before Hon. Moses Herrman, Presiding Justice; Hon. Thomas J. Nolan, Associate Justice; Hon. Albert V. B. Voorhees, Associate Justice

January 5th, 1923.

Appearances:

For the People: Asst. District Attorneys John T. Hogan, Edward J. Kilroe, Robert D. Petty, Felix C. Benvenga.

For the Defendant: Louis Marshall, Esq., Guggenheimer, Untermyer & Marshall, 120 Broadway, New York City.

J. J. Garvey, Official Stenographer.

[fol. 6] Mr. Marshall: The defendant is not here but we will admit all the facts and try the defendant in his absence. The facts will all be admitted.

Mr. Hogan: We would like to have the police officer testify to show some semblance of a trial.

The Court: Call your witness.

JOHN CUNIFF, a Police Officer, shield number 551, attached to the Main Office Division, the complainant, being duly sworn, testified as follows:

Direct examination by Mr. Hogan:

Q. You are a police officer of the Police Department, attached to the District Attorney's Office?

A. Yes, sir.

Q. Of the County of New York?

A. Yes, sir.

Q. Do you know this defendant, Reuben Weller?

A. I do.

Q. On the 26th day of October, 1922, did you see Mr. Weller?

A. I did.

Q. Will you kindly state in detail the circumstances under which you did see him, and the conversation, if any, that you had with him?

A. I went into the defendant's place of business, at 1560 Broadway.

Q. Located in this City, in the Borough of Manhattan, County of New York?

A. Yes, sir.

Q. What did you do after entering his place of business?

A. I purchased two tickets and paid for them, and I asked him if he was in the business of selling tickets, and I asked him if he had a license to resell tickets under this law and he said, he did not, and I placed him under arrest.

[fol. 7] Q. Did you ask him anything with reference to the law of the State Comptroller?

A. I did.

Q. Are these tickets that were purchased by you?

A. Yes, sir.

Q. And that he sold you?

A. Yes, sir.

Q. How much money did you pay the defendant for these two tickets?

A. My recollection was \$2.00 apiece, \$4.00 for the two tickets.

Mr. Hogan: I offer the two tickets in evidence.

The Court: Received.

(Marked People's Exhibit One in Evidence.) (Two tickets.)

(Left G. S. Orches. \$1.10.

B. F. Keith's Palace.

Th. Good Only Matinee Oct. 26.

B. F. Keith's
 Palace
 Theatre,
 Broadway & 47th St.
 Oct. 26, Thursday Matinee.
 Th. Estab. Price \$1.00.
 Tax Paid 10¢. Total \$1.10.

If sold or resold in violation of the provision of the Theatre Ticket Ordinance, approved Dec. 28th, 1918, this ticket will be refused at the door.

See reverse side for important notice. Back of ticket.

Notice Agreement

This ticket is sold and purchased upon the express understanding [fol. 8] that it is and shall be a personal license, not transferable and good only to admit the person who purchased it at the box office of the Palace Theatre. If resold or purchased from any other person, or from a speculator or at any other place than said box office, it shall be absolutely void, not good for admission and the Palace Theatre and Realty Company originally selling this ticket may retain the sum paid therefor as liquidated damages."

"Left G 9, same as above.")

Q. Did you ask the defendant if he had taken out a bond in pursuance to the law?

A. I did, and I also asked him if he was aware of the new law that required him to have a bond and he said, he was, and I said, up to the present you have not taken out a bond, and he said, no.

Mr. Hogan: Will it be conceded by Mr. Marshall, the People's Exhibit One in Evidence, two Palace Theatre tickets, are tickets of admission to the Palace Theatre and entitled the holder to admission on the date stamped thereon, to the matinee of Thursday, October 26th, 1922.

Mr. Marshall: I will concede that.

Q. Did you ask the defendant, if he was in the business of reselling theatre tickets?

A. I did.

Q. What did he say in response to that question?

A. He said, he was for the last ten years.

Mr. Hogan: Will it be conceded that the defendant has not complied with Section 168, of the General Business Law.

[fol. 9] Mr. Marshall: I will concede that Mr. Weller did not have a license and has not had a license and that he did not give a bond, and that he did not comply with the requirements of the statute, which is Chapter 590, of the Laws of 1922.

Mr. Hogan: With that concession, that is the People's case.

Mr. Marshall: I will also admit that he did not make an application because, I advised him that the law was unconstitutional.

Mr. Hogan: People's case.

DAVID MARKS, a witness called by the defense, being duly sworn, testified as follows:

Direct examination by Mr. Marshall:

Q. You reside in the City of New York?

A. Yes, sir, at 166 West 87th Street.

Q. What is your business?

A. Theatre ticket broker.

Q. How long in that business?

A. Thirty years.

Q. Are you well acquainted with the theatre ticket brokerage business?

A. Yes, sir.

Q. Do you know how long that business has been carried on in this community?

A. Over sixty years.

Q. Do you know who the pioneer of that business was?

A. George Tyson.

Q. Is that business still in existence?

A. Yes, sir.

[fol. 10] Q. How long in business?

A. Fifty-one years.

Q. What do you know about the duration of the existence of the McBride Agency?

A. Forty-five years approximately.

Q. In a general way, how is that business carried on and has it been carried on?

A. We have charge accounts with various people in the City of New York and outside of New York and we do a cash business, and a charge of fifty cents is still maintained in the large offices in the City of New York.

Q. And occasionally you charge more?

A. Yes, sir.

Q. Why is that?

A. We are compelled to buy merchandise months in advance, and if the show is a poor show the loss is ours.

Q. You look upon these tickets as merchandise?

A. Yes, sir.

Q. Whom do you get these tickets from?

A. Theatre managers.

Q. How do you get them from the theatrical managers?

A. We buy them in blocks, each office is allowed so many seats.

Q. The theatrical managers put on a production, whatever the play may be?

A. Yes, sir.

Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production?

A. Yes, sir.

Q. When is that part of the arrangement made?

A. Before the show is cast and before we know anything about

who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

Q. Who sends for you?

A. The managers of the various productions.

[fol. 11] Mr. Hogan: I move to strike out the testimony up to the present time given by this witness on the ground that it is irrelevant, incompetent and immaterial. If Mr. Marshall concedes the facts, what is the purpose of this line of examination?

Mr. Marshall: Here is an act of the legislature which deals with a business that has been established for sixty years. It undertakes to fix the price that must be paid for tickets. It requires a bond and also requires a license, and the provisions are interwoven with the price that is to be charged for the tickets. Our contention is, that the attempt to regulate what price shall be is in violation of the Constitution, both of the State and the United States. We have had that question before the Court of General Sessions, in the case of the People against Cohen and the People against Newman, in which case Mr. Justice Rosalsky wrote a very elaborate opinion and in which he holds that a statute or ordinance that would attempt to regulate the price of tickets is unconstitutional. This statute provides for the procuring of a license and also the price at which tickets shall be sold, and provides that a bond shall be given by a person who obtains a license, and that the license can be revoked and the bond enforced if there is any violation of statute. Consequently, if a charge is made beyond the price fixed by the statute, that would result in a nullification of the license and would at once create a [fol. 12] liability on the bond. Therefore, under the decisions, whatever might be the law as to the right to require a license, but for these provisions the whole statute is made null and void by their presence. I will be able to show this by a number of decisions of the Court of Appeals and of the United States Supreme Court. It is therefore necessary to show the method in which this business of selling tickets is carried on.

Mr. Petty: The defendant's attorney, Mr. Marshall has referred to the case of the People against Newman, 109 Miscellaneous Reports, and the Court there gave as one of its grounds, that the offense charged was a violation of an ordinance and not of an act of the legislature, on page 659. And further on stated, that error was committed by the Magistrate by excluding evidence offered by the defendants; and on page 652 of the same opinion his Honor says, while reasonableness of an act of the legislature may not be questioned, that is not the case where the Board of Aldermen pass an ordinance. This is not an ordinance but the act of the legislature and every presumption is in favor of the finding of the legislature. I would ask your Honor to look at Section 167, and say that we have the right to infer from that, that the legislature looked into these facts, and all the courts have held that when the legislature looks into the facts, they are competent to do so, and the case of the People against Newman has no bearing on the question, as that was a violation of an ordinance.

[fol. 13] Mr. Marshall: We are not going to try anything except the question of the validity of the statute but in order to get the proper light on the subject I am offering this testimony. It may not be known by the Court how the business is carried on, and how it is serving the public, and what the charge is made for. It is not so much for commodity as for the service of procuring the commodity for the person who desires the ticket. These facts are useful as giving a proper background to this case. Governor Miller vetoed a similar bill in 1921, and although he signed the bill of 1922, he expressed serious doubts of its constitutionality. The legislature cannot make a law constitutional or unconstitutional by labelling it a certain way. That is a matter that I shall presently discuss. What we are now interested in is to show how this business is conducted and the reason why it is necessary at times to charge more than fifty cents for a ticket. It can do no harm to take this evidence and your Honors may conclude to disregard it when you decide this case.

Mr. Petty: I am familiar with Governor Miller's letter, and it indicates the tendency of the times. The first bill he vetoed and the second he signed, and he stated that the licensing feature of the bill was valid. No doubt it is true, that a legislative declaration of facts that a certain use is a public one may not be held conclusive, but the declaration of the legislature is entitled to great respect.

[fol. 14] I think we are willing to let this go in the record under our objection.

The Court: Your motion to strike out is denied.

By Mr. Marshall:

Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place?

A. Yes, sir.

Q. What is the nature of the conversation?

A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance. We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the show or the cast, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

Q. In other words, you finance the theatrical performance?

A. Yes, sir.

[fol. 15] Q. And you have to pay in advance?

A. Yes, sir, and it takes hundreds of thousands of dollars.

Q. Suppose the play is not a success?

A. They are left on our hands. We have a return privilege of twenty-five, sometimes fifteen and sometimes ten. If a person wants three tickets and we make a \$1.50 total profit on tickets that may have cost four or five dollars apiece.

Q. That has been going on all these years?

A. Yes, sir.

Q. And that is still the practice today?

A. Yes, sir.

Q. Do they ever take these plays off the boards before the full period of time?

A. I have not heard of two cases where they stopped the show.

Q. You have not heard of more than two or three cases, where notwithstanding the fact that the play is a failure they have stopped the performance?

A. Yes, sir.

Q. And because you are bound to pay this amount, it is a dead loss if you cannot sell the tickets?

A. Yes, sir, a loss of thousands of dollars on a production.

Q. And that is your experience?

A. Yes, sir.

Q. They allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets?

A. Yes, sir, right.

Q. What is the organization of these different ticket brokerage concerns?

A. They have a place of business. We pay twenty thousand dollars a year rent, with a twenty years lease, and our expenses are \$156,000 a year, with the lease, book keepers, stenographer, salesmen [fol. 16] and messengers and we are only the third largest in the City of New York.

Q. Which is the largest in the city?

A. Tyson Company, \$500,000 a year.

Q. Why do you need this large staff?

A. We have to have a private telephone to the theatre, and we have five thousand dollars of telephone bills; we have two telephone operators, from nine to nine, two operators, practically two staffs, we call it a staff, one short day and one long day. We have to have salesmen, our place is filled all day with people and they all want successes and that swells our losses. We make one sale in seven to every eighth person a sale and seven we lose over the telephone and at the counter, owing to not having the merchandise the person desires. They all want front seats.

Q. They want tickets for the successful plays and not for the others?

A. Yes, sir. We have eighteen salesmen, a cashier and head bookkeeper and a credit man and six assistant bookkeepers; we have over five thousand charge accounts.

Q. And you have messengers take the tickets to the place?

A. We deliver tickets to the theatre or send them to your home or leave them at your downtown office, or you stop for them on your way home.

Q. Do you have an established rate of profit?

A. It is fifty cents, we are not allowed to charge more.

Q. You have charged more in some cases?

A. We charge fifty cents for every ticket we handle.

Q. What you have said, as to the method of doing business is practically the same in all cases?

A. Yes, sir.

[fol. 17] Q. Are there cases when you do charge more than fifty cents?

A. Yes, sir.

Q. Explain?

A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service.

By Justice Nolan:

Q. What makes the market price?

A. The law of supply and demand.

Q. What is the law of supply and demand in reference to theatre tickets?

A. If a show is a big success everyone wants to see it.

Q. What makes the market price, the scalpers on the street, the speculators, or at the box office?

A. I don't quite get that.

By Mr. Marshall:

Q. Suppose there is a performance of Hamlet and it is very popular?

A. Yes, sir.

Q. And we will say you have no tickets for that and that you have a customer who desires two tickets for that play?

A. Yes, sir.

Q. In the case you have to go out and get these tickets for whatever is charged you?

A. Yes, sir, whatever is charged us by somebody else.

Q. And the fifty cents is payment for the service that you rendered to this customer for getting him those tickets?

A. Yes, sir, correct.

Q. You get for him the ticket that is indicated and for your [fol. 18] service to the customer in supplying him with that ticket you make this additional charge?

A. Yes, sir.

Q. When you have not got the tickets you go out and get them from the person who may have them?

A. Yes, sir.

Q. Precisely as if you wanted to buy any other article for which there is a great demand and a limited supply, you have to pay whatever the man who has the article demands of you?

A. Yes, sir.

By Justice Nolan:

Q. And the man that has the article, that is what you determine as the market price?

A. Yes, sir.

By Mr. Marshall:

Q. Will you explain what these charge accounts are, the way in which you carry on the business in reference to the charge accounts? You have five thousand customers whose names are on your books?

A. Yes, sir.

Q. They purchase tickets regularly?

A. Yes, sir.

Q. If they want to go to a theatre, they call you up and say that they want a certain number of tickets and they want you to get them for them?

A. Yes, sir.

Q. And you get them the tickets and you charge them the amount that they are to pay you?

A. Yes, sir.

Q. And every month you send them a statement and they pay you the amount?

A. Yes, sir, and we have losses at the end of the year.

[fol. 19] Q. Sometimes they don't pay, just as in the case of any other credit business?

A. Yes, sir.

Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office?

A. No, sir. The best they could get for any show is the fifteenth or sixteenth row.

Q. The best seats have been sold?

A. The choice seats.

Q. If anyone desires to go to the theatre for them at night, they would be far back in the house?

A. Yes, sir.

Q. Some of your customers are people who are hard of hearing?

A. Yes, sir.

Q. And they desire to get front seats?

A. Yes, sir.

Q. And there are some whose eyesight is bad?

A. Yes, sir. We have only one customer who wants the last row, she is afraid of fire.

Q. The further towards the front they get, the better they like it?

A. Yes, sir.

Q. If they stood in line at the theatre, they would have to stand there for quite a time?

A. Yes, sir.

Q. And they would have to leave their homes and places of business and wait around the theatre and lose a lot of time?

A. Yes, sir.

Q. And you as theatre ticket broker relieve the customer of all that inconvenience and annoyance?

A. Yes, sir.

Q. Isn't it a fact that you sell tickets to people who live out of town?

A. Yes, sir, we receive letters from all over the state, and from as far away as Los Angeles, and I believe we have fifty customers [fol. 20] in St. Louis alone, and we get orders every day by mail.

Q. They inform you that they will be in New York at a certain time?

A. Yes, sir, and that they want so many seats and they want to see so many shows, and send us their checks and leave the amount blank. Up until ten years ago you could get choice seats for \$2.00, and now if the theatre has a success it cost up to \$5.50. If it is a failure it goes to the cut-rate ticket office. At best there are two hundred desirable seats for successful shows in New York City, with an audience of one thousand to crowd into these two hundred seats. Nobody wants to go back of the tenth row, they all want the first five or six rows and it is impossible to please them all.

By Justice Herrman:

Q. If the play runs long enough can't they be suited?

A. Lightning ran three years, and there were thousands who did not get a chance to see it. Each office gets a few front seats, there are about two hundred choice seats, there are four to the small offices and fifty to the larger offices, how far the tickets will go in the first ten rows.

By Mr. Marshall:

Q. There are a great many strangers in town at various hotels?

A. Yes, sir.

Q. They don't know long in advance of their coming when they will be here or what they want to see and yet they wish to go to the theatre?

A. Yes, sir.

[fol. 21] Q. If they had to get their tickets in the old fashioned way, they would not be able to go to the theatre?

A. No, sir.

Q. And therefore they avail themselves of the agency of the ticket brokers, who will perform for them that service?

A. Yes, sir. We also take back all tickets up until eight o'clock. We got fifty-six cancellations last Thursday. We do that as a courtesy to the customer and the customer must be pleased, and if he brings a ticket back, the loss is ours if we cannot sell them.

Q. How many of these tickets prove to be a loss of a night?

A. Sometimes one hundred and sometimes two hundred. We have tickets running into \$250,000 a year.

Q. Tickets you can never dispose of?

A. Yes, sir.

Q. And that includes tickets that were returned to you that you cannot dispose of?

A. Yes, sir. We have a customer ring up and orders tickets, and we presume he is on the wire, and when the bill is rendered he denies the goods and says he never saw the show and never had the goods. We have hundreds of cases where the loss is ours.

Q. If a man has not a very large establishment such as yours, who has not so large a business as yours, he has to charge more than fifty cents to make ends meet?

A. Yes, sir, he cannot exist on it. We only have at best ten successes annually and we produce a hundred shows, and seventy-five of them are rank failures.

Q. They all have to have places of business and telephones and all other expenses?

A. Yes, sir.

Q. And the total amount of their expenses is such that in order to [fol. 22] get an ordinary revenue out of the business, they have to charge above fifty cents on the price indicated on the ticket?

A. Yes, sir.

Mr. Marshall: As illustration, I offer in evidence the statement of the defendant, Reuben Weller.

Mr. Hogan: Under our general objection.

Mr. Marshall: It is a statement of the business done by Mr. Weller, the defendant in this case, from the period January 1st, 1921, to October 31st, 1922, showing the total receipts, the number of seats sold each month, the total premium that he received in all of his operating expenses.

Mr. Hogan: Under the general objection to strike out all of this testimony.

The Court: Objection overruled. The statement is received in evidence.

(Marked Defendant's Exhibit "A" in evidence.)

Q. The amount received for tickets over and above the amount marked on the ticket is called premium?

A. Yes, sir.

Q. What is meant by deadwood?

A. Unsold tickets, which is a great part of the operating expenses

[fol. 23] DEFENDANT'S EXHIBIT "A" IN EVIDENCE

Weller's Ticket Office

Statement of Receipts and Expenditures for the Period January 1,
1921, to October 31, 1922

1921

	Tickets sold	Premium
January	1,740	\$913.50
February	1,721	903.52
March	1,672	877.80
April	960	504.00
May	586	307.65
June	412	216.30
July	155	81.38
August	400	210.00
September	890	467.25
October	435	228.37
November	518	271.95
December	650	341.25

Total premiums	\$5,322.97
----------------------	------------

Operating expense:

Rent	\$3,792.00
Salaries	2,400.00
Telephone	225.00
Sundry	282.00
Deadwood	318.00

Total operating expense	7,017.00
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Loss for the year 1921	\$1,694.03
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[fol. 24]

1922

January	417	\$218.92
February	406	213.15
March	337	176.93
April	339	177.98
May	413	216.83
June	282	148.05
July	179	93.98
August	239	125.48
September	364	191.10
October	462	242.55

Total premiums	\$1,804.97
----------------------	------------

Operating expense:

Rent	\$2,160.00
Salaries	2,000.00
Telephone	185.00
Sundry	220.00
Deadwood	205.00

Total operating expense 4,770.00

Loss January 1, 1922, to October 31, 1922 \$2,965.03

Cross-examination by Mr. Kilroe:

Q. Where is your place of business?

A. 1490 Broadway.

Q. How many people interested in your business?

A. Myself, Mr. Tyson and Mr. Kiesel.

Q. How many tickets do you sell per year?

A. Over one thousand tickets a day.

[fol. 25] Q. That would be over three hundred thousand tickets a year?

A. Yes, sir.

Q. Your concern has not gone into bankruptcy?

A. No, sir.

Q. It has made money?

A. Made a good comfortable living.

Q. Have you a license?

A. No, sir.

Q. How many theatres are there in the Borough of Manhattan?

A. Approximately sixty first class theatres.

Q. Do you know what their capacity are?

A. Some as low as two hundred.

Q. The total capacity?

A. Around sixty thousand or fifty-five thousand.

Q. How many ticket speculators are there?

A. Ticket brokers.

Q. Yes, how many?

A. Tyson and Company have eighteen branches, would you call it one office, or call each branch an office.

Q. Call each branch a separate office?

A. About thirty offices.

Q. There are thirty offices where you can buy tickets from ticket brokers?

A. Yes, sir.

Q. And they are controlled by how many people?

A. Probably a dozen or fifteen.

Q. McBride is one of the largest?

A. Yes, sir.

Q. And he sells approximately how many tickets a year? Five hundred thousand tickets a year?

A. I think so.

Q. And his rate is fifty cents over the amount printed on the ticket?

A. Yes, sir.

Q. He has not gone into bankruptcy?

A. Not that I heard of.

Q. He has been doing business for forty-five years?

A. Yes, sir.

[fol. 26] Q. Do you know whether McBride has a license?

A. I could not answer that.

Q. Have you heard that he has?

A. I have not.

Q. Have you heard how many tickets are sold by the brokers in a year?

A. Approximately two million tickets.

Q. And that would be at least fifty per cent of the desirable seats in the theatre?

A. In the downstairs only.

Q. They don't deal in balcony seats?

A. The broker does not handle cheap seats, we don't sell ten a year. He might pick out for a success six of the cheaper seats, no reputable house will take only the first ten or twelve rows.

Q. Would you say, that the greatest percentage of the tickets sold are sold to out of town men?

A. I don't know.

Q. Don't you know that it is almost impossible for a resident of New York to get a choice seat?

A. No, sir, I don't agree with you; ninety or ninety-five per cent of my business is New Yorkers.

Q. You say, you sometimes charge over fifty cents?

A. Yes, sir.

Q. In what percentage of the tickets that you sell would that happen?

A. Ten tickets a day, or twenty tickets a day.

Q. Not any more?

A. Yes, sir, and many days none at all.

Q. The occasion for charging more than fifty cents is because you have to go outside and pay more for the tickets?

A. Yes, sir, right.

Q. Isn't it a custom among the brokers that they practice very extensively, if a man comes in for a ticket, the broker will say, I have not got it but I can get it for you, and have one of the salesmen take [fol. 27] it out of his pocket?

A. No, sir, not us, we will give two tickets or the tickets, if he will give us two tickets for some other night in exchange.

Q. How many buy-outs a year does your concern make?

A. Approximately one hundred.

Q. What do you mean where you take a block of seats?

A. We are compelled to buy so many tickets for each show eight weeks in advance.

Q. The producer insists on you taking the seats?

A. Yes, sir.

Q. Do you have to pay a premium for good seats?

A. There was never a premium, only when they are on sale, they charge ten per cent.

Q. Didn't they charge twenty-five per cent?

A. They did but not since the war.

Q. Do you remember an investigation that was conducted two years ago by the District Attorney's office?

A. Yes, sir.

Q. Do you remember the testimony of Mr. Fallon then?

A. No, sir, I don't.

Q. Were you present at that time?

A. I don't think I was.

Q. Among the thirty speculators, how do you arrange as to who gets the tickets?

A. Every one gets a few. I have the same seats year in and year out, if I am entitled to from 101 to 108 I get them.

By Mr. Marshall:

Q. The box office makes its schedule?

A. Yes, sir, and the succeeding man gives you the same seats.

Q. And that saves them a lot of trouble?

A. Yes, sir.

[fol. 28] By Mr. Kilroe:

Q. And you charge for them at fifty cents advance?

A. Yes, sir.

By Justice Nolan:

Q. Tell us how many of these 300,000 odd seats you get at the open market price?

A. Three or five thousand.

Q. That you get by exchange?

A. We don't charge any more on the exchange, we accommodate each other.

Q. About how many would you buy at the market price?

A. Sometimes ten or twenty a day and sometimes none.

Q. About how many out of the 300,000 seats that you sell?

A. I don't think it would not exceed five or ten thousand. We have a very short season, it only extends six months.

Mr. Marshall: Defendant rests.

Mr. Kilroe: We desire to offer in evidence, with the consent of Mr. Marshall, Exhibits A, B, C, D, E, F, G and H, from pages 30 to 43, in the printed case on appeal of the People of the State of New York against Leo Newman and have it put in this record.

Mr. Marshall: I don't object to it.

The Court: It will be received without objection. Received in evidence.

(Marked People's Exhibit 2 in Evidence.)

[fol. 29]

IN COURT OF SPECIAL SESSIONS

People's Exhibit 2

EXHIBIT A (PART OF COMPLAINT)

Statement of David Warfield to A. D. A. Kilroe September 23rd,
1918

Steno.: Egan.

Present: Joseph Rosenback.

By Mr. Kilroe:

Q. What is the name of your concern?

A. Theatre Ticket Library.

Q. That is a corporation?

A. No, it is a trade name.

Q. Who owns the business?

A. I own the business and my brother.

Q. What is your brother's name?

A. Barney Warfield.

Q. Where do you reside?

A. 2090 7th Avenue.

Q. How long have you been in the theatre ticket business?

A. About 17 years.

Q. You have a permit from the U. S. Government?

A. Surely.

Q. In whose name is that?

A. In the name of the Theatre Ticket Library, my name.

Q. The trade name?

A. That's right.

Q. Were you selling tickets for Yip Yip Yaphank?

A. I sold a few tickets; about 40 or 50 tickets for the three weeks.

Q. At what price?

A. Some tickets that I purchased for \$3.50 I sold for \$4.00.

Q. Do you make an entry of every purchase you make?

A. Absolutely.

Q. And of every sale?

A. Absolutely; the government gets 10% of the selling prices and we collect that from the public.

Q. How do you keep your records?

[fol. 30] A. We have books; the books are always open the same as any other concern.

Q. How many men have you got in your employ?

A. About five.

Q. No more?

A. No more.

Q. Any men selling on commissions?

A. No; we are the only men who sell them on the inside.

Q. Got any steerers out?

A. No steerers whatsoever.

Q. Don't have any going out along the line?

A. No.

Q. Give me the names of the men you got working for you?

A. Dan Morris, John Dunlevy, Sam Clark and a new errand boy; he has only been employed three days. I wouldn't know their addresses.

Q. Have you got a record of their addresses?

A. I have it in the office.

Q. And when they went to work?

A. Yes.

Q. What do these men work at?

A. They sell tickets behind the counter and answer the telephone.

Q. What do they do outside?

A. We have an errand boy that delivers return tickets at the box offices.

Q. You only have five men in your employ?

A. Yes, sir.

Q. Any women in your employ?

A. No women.

Q. You mentioned four of them?

A. And Abe Levy.

Q. What does he do?

A. He delivers tickets on the outside.

Q. How much do these men get?

A. They average all the way from \$11 a week up to \$40.

Q. No commissions are paid?

A. No commissions at all, straight salary.

[fol. 31] Q. Will you bring your books down here so that we can see them?

A. Certainly.

Q. How old are these men?

A. Dan Morris is 36, Johnny is about 17, Abe Levy is about 34 or 35.

Q. Have you ever handled any tickets for any charity enterprise?

A. Very few.

Q. Do you keep a cash register?

A. No, every seat that we sell is registered.

Q. How?

A. We have a sales book.

Q. How are they kept?

A. Everything is entered in the book, and the selling price is entered and the return tickets are checked up.

Q. If I come in and I buy four tickets at \$5 apiece, what entry is made?

A. Four tickets cost \$5 and the government so much, and the name of the theatre and the day of the charge account is entered.

Q. Who is your bookkeeper?

A. Dan Morris.

Q. Nothing is sold out on the sidewalk?

A. No, it is too petty. The only fellow I have is Abe Levy calling outside of our door.

Q. Was he arrested?

A. Yes.

A. How many times?

A. Two or three times. He was arrested and arraigned before Magistrate Nolan about three months ago; he was discharged.

EXHIBIT B (PART OF COMPLAINT)

In re Ticket Speculation

Statement of James F. Mulligan

Made to A. D. A. Kilroe.

Date: October 12th, 1918.

Steno.: Egan.

I am the vice-president of Boscom, Inc., a New York corporation. [fol. 92] This concern is engaged in the sale of tickets, newspapers, magazines and periodicals. This concern has offices at the Biltmore, Manhattan and Plaza Hotels and The Ansonia. We are to have the New Commodore when it is ready for occupancy. I think the rental of the Biltmore is about \$800 a month. We have a written lease for ten years; the first five years is to be at \$600 a month, but it increases about \$100 a month each year; it is on a sliding scale. It is to remain at \$700 a month and I think it remains that way for the next five years. The rental at the Plaza is now between \$500 and \$600. I think this lease is for ten years. I don't know how the lease at the Commodore stands; it is on a sliding scale. The Ansonia is really a branch of the Biltmore. Our yearly income for tickets at all places between January, 1918, and October, 1918, is as follows:

Gross	72,000
	81,000
	70,500
	57,000
	37,000
	25,000
	32,000
	62,000
	<hr/>
	436,500

Income at the Different Hotels

A	28,000
B	125,500
C	74,800
	<hr/>
	3) 228,300
	<hr/>
	76,100

[fol. 33] The most we ever obligated ourselves during the last year was \$1,600 or \$1,700. We pay by the week. The producer had a right to rely on us for \$1,600 worth of tickets for a particular show within a certain period. The highest figure for any one show a week would be about \$400. We never bought four months in advance. Any one can come into Boscom's and get his tickets out of the rack for 50 cents extra plus war tax. We pay 25 cents to the house for our tickets.

EXHIBIT C

In re Theatre Ticket Speculators

Statement of Mr. David Marks, Taken by Mr. Edwin P. Kilroe, Assistant District Attorney, November 13, 1918

I am the president of the United Theatre Ticket Corporation. We are incorporated under the laws of the State of New York and have our main and only office at 1465 Broadway. None of our stockholders are play producers.

We sell considerably over 100,000 tickets a year. Our monthly sales of course vary. In the summer time they run very low. We average from eight to ten thousand a month. In the month of September we sold 7,368 tickets.

Our rent is \$7,500 a year, for a long term of years. Our payroll amounts to about \$1,800 a month. We have six men actively engaged in selling tickets. The highest salary paid is \$60 a week. Besides these six men we have six other employees, four of them being delivery or messenger boys, and a stenographer and a book-keeper.

[fol. 34] About 95% of my business is done on a 50 cents advance basis. The government has investigated us and found that to be the case. Of course some tickets we sell for more than a 50 cents advanced price. Every man in the business has to do that to offset losses. I get stuck on some tickets myself at times.

I have handled opera tickets, but didn't get any bonus on them this year. We did in former years. I am a regular subscriber this year, the same as Tyson or McBride. We pay a bonus on them to the subscribers that we buy from, and then we charge a bonus. I have no fixed rule on opera tickets. Most of the time I sell for 50 cent advances. For tonight's and tomorrow night's opera, for instance, I would be glad to sell the tickets for half price. Opera tickets don't sell well unless Caruso or Farrar are the headline artists.

One good show has to carry about five bad shows. There are about 100 shows produced in this city each year. Out of the 100 productions 60 of them are absolute flat failures, 25 of the others are what we call mediocres, and the last 15 are successes, about 6 of which are real good successes, and the others are pretty fair. We "buy out" in advance for about fifty of these productions annually. That's blind gamble, because we buy out a certain quantity without even

knowing who is in the cast. Out of the fifty we have six successes, real successes. Now, we have forty, about forty shows, which entail an absolute loss to us, costing my office alone from \$5,000 to \$10,000 a year in dead losses, that is, tickets which we couldn't well sell at all or tickets we had to sell at less than what they cost us. Now the six successes must necessarily help us to pay the losses on the other forty bad ones.

[fol. 35] In "buy-outs" every agent is called in and told that they are going to produce, for instance, the "Ziegfeld Follies," and it's going to be a grand thing and all that and they ask each agent how much he wants to get, thus insuring his production for eight weeks.

Usually I take care of seven agents on the "buy-outs" besides tickets for my own office. The largest sum of money I have paid in advance for one production was on the "Ziegfeld Follies" this year. I bought and paid for in advance \$40,000 worth of tickets for this production for myself and my seven agents. We have about fifty "buy-outs" a year.

A "buy-out" practically insures the success of a show. We have to pledge ourselves to take a certain number of tickets each night for eight weeks, paying the actual cash one or two weeks in advance, renewing some of the buy-out pledges. We even have to pay a 25 cent advance on many tickets, and on real successes do not get any returns allowed. On some shows where we pay a 25 cent advance we are allowed a 25% return before 7:30 P. M. Mr. Ziegfeld tried to make us pay a 50 cent advance but we turned him down. We bought from practically every producer.

I refuse to answer your question as to how much it costs to "oil" the treasurers to get good locations. We don't manipulate the treasurers. We get the tickets on buy-outs. The treasurer has nothing to do with that.

The people I buy tickets for besides my own office are (Wesley) Tyson & Bro., 1 West 42nd Street; Louis Cohen, Times Building; Edward Alexander, 41st Street and Broadway; Leo Newman, Broadway and 42nd Street; New York Ticket Library (Warfield), 212 West 42nd Street; J. L. Marks, 1598 Broadway; Rollman 111 Broadway [fol. 36] way (Trinty Building); and myself—United Theatre Ticket Company, 1465 Broadway.

I am handing you a statement showing the profits I make. I don't even average a fifty cent profit on all my tickets including those sold at high prices.

In London they sell tickets to the agents at a ten per cent. discount. If they did that here we could easily live up to a 50 cent limit on profits in selling tickets.

If you will co-operate with the managers and ticket men in this way take three ticket men, three managers, your office, our attorney for our side, an attorney for the managers, and take three theatre-goers and sit down and have a conference on the matter you might be able to accomplish much. Let them thrash this out and appoint a committee to investigate our books and then arrive at a fair conclusion as to what ought to be done in all fairness. In this way you could probably accomplish a great deal of good, and I make that as a suggestion to you.

EXHIBIT D

In re Investigation Theatre Ticket Speculation

Statement of William J. Fallon, Tyson Co., 1482 Broadway, New York City. (Telephone, Bryant 9000)

To: A. D. A. Kilroe.

Present: D. A. D. A. Sullivan, Thomas Naughton, Manager for Tyson Co.

Stenographer: F. W. Craig.

My home is at Setauket, Long Island, N. Y. I stop at the Van- [fol. 37] derbilt Hotel when in New York City. The Tyson Co. does a theatrical ticket brokerage business. We have news stands and sell cigars, candy, etc. The Tyson Co. is a New York Corporation. I am the principal stockholder, and C. B. Zabriskie has an interest in it. Mr. Zabriskie is in the borax business. That is my business, too. There are two or three other stockholders. Shuberts at one time held stock in it. I bought them out. They have no interest in it now directly or indirectly. They haven't owned a share of stock in it since September 9, 1916, I think. No other Tyson has any interest in it. There is one share held by some Fannie Hamilton. I have 99% of the stock. We have 19 branch offices in this city. This booklet shows where they are (handing same to Mr. Kilroe). Our lease at the Waldorf Astoria has about four years to run. The rental is \$12,000 a year. Our lease at the Hotel Knickerbocker has about three more years to run; at the Hotel Vanderbilt, four years. We pay \$2,400 a year at the St. Regis Hotel. The rate there is more reasonable because it is a family hotel. At the Hotel Breslin we pay \$4,000 a year, and our lease has a year to run there. At the Hotel Wolcott we pay \$50 a month. The office at the Hotel Pennsylvania is on a percentage basis; I give them 80% of the profits, net profits. We pay \$8,000 a year at the Hotel Belmont, and the lease has about three years to run. At the Savoy Hotel we pay \$2,000 a year. At the Holland House we pay \$2,400. At the Hotel Claridge we do not pay any rent; we just share the profits there. At the Hotel Le Marquis we pay no rent; profit sharing basis. At the Hotel Antionette we pay \$600 a year. We pay \$7,200 at the Hotel Astor a year; the Ritz-Carlton \$4,000 a year, the Hotel Martin- [fol. 38] ique \$4,000 a year. The Hotel Imperial \$10,000, the Murray Hill Hotel \$4,000, the Hotel Stratford, no rental, that is profit sharing basis. We pay \$4,000 a year rental at 1482 Broadway. We sell about a million tickets a year. We have some Boston offices, also. Our weekly salary list is about \$2,000 or \$2,200. The highest salary we pay is \$8,000 a year. I think we had 18 buy-outs within the last year. When conditions are normal, say last winter, we bought out two, four, eight weeks ahead. We have bought 24 weeks ahead within the last five years; 400 seats a night for 24 weeks, an entire floor, that is, 57,600 tickets, nearly \$120,000. We bought those ahead at one time, at one theatre and paid for them

two weeks at a time. I do not care if you make this fact known publicly. We have paid commissions, as high a commission as \$20,000. All that appeared before the Legislature. I think I produced the checks up there, with Marc Klaw's signature on them. We have the checks now that were produced before that legislative committee. We had no return privileges at all. We get returns now. We did not get a return on the Potash and Perlmutter show. We sell tickets at 50 cents advance on the regular price. We get about 25 cents a ticket gross. For instance \$2 tickets are sold by us for \$2.50. Our policy is to charge only 50 cents a ticket more than we pay for the ticket.

[fol. 39]

EXHIBIT E

United Theatre Ticket Company—Statement of Business

For the month of September, 1918:

Cash sales for month.....	14,128.95	
Charge sales for month.....	9,936.35	
Total sales for month.....	24,065.30	
Agencies	34,072.20	
Tickets on hand Sept. 30, 1918.....	2,621.15	
Total		60,758.65
Purchases for month.....	55,973.15	
Tickets on hand Sept. 1, 1918.....	1,160.90	
Total		57,134.05
Gross profits.....		3,624.60
Charges against same:		
Rent	618.34	
Costs	7.25	
Unsold tickets	127.00	
Telephones	105.00	
Discounts	91.20	
General expenses	701.12	
Water and ice	5.24	
Salaries	1,883.00	
Car fares	28.00	
Portages	16.60	
Total expenses		3,582.75
Net earnings		41.85

Total tickets sold for month.....	7,368.00
Total gross profits for month.....	3,624.60

Average about 49 1/5 cents a ticket.

[fol. 40]

EXHIBIT F

In re Theatre Ticket Speculation

Statement of Louis Cohen, Taken by Mr. Edwin P. Kilroe, Assistant District Attorney, November 13th, 1918

I have my place at the Times Building, and have no other office. I am incorporated, and I am the only stockholder in the corporation. I sell about 30,000 tickets a year. My salary list is about \$1,200. I pay \$4,500 a year rental, on an annual lease. On the buy-outs Mr. Marks here has explained that. On the good shows and the bad shows, the same thing as he had told you about applies in my case. He buys all the tickets for me on the buy-outs. I buy them individually on some shows. When I took so many tickets for "Friendly Enemies," I had to take so many for "Under Orders," and we had to sell the tickets for "Under Orders" for \$1 each to get them off our hands to avoid losing the total cost of those tickets.

EXHIBIT G

Theatre Ticket Library

- Question 1. One office, \$4,800 yearly.
- Question 2. 55,000 tickets sold yearly.
- Question 3. \$13,000 yearly expense.
- Question 4. \$615.54 income tax.
- Question 5. \$525 monthly salary list.
- Question 6. 6 persons employed.
- Question 7. 600,000 purchased yearly.

[fol. 41]

EXHIBIT H

CITY OF NEW YORK,
County of New York,
State of New York, ss:

John McBride, being duly sworn, deposes and says that he is an officer, to wit, treasurer of the McBride Theatre Ticket Offices, Inc., with principal place of business at 71 Broadway, New York City, Borough of Manhattan, and branch offices at 66 Broadway, 1497

Broadway, Hotel McAlpin, Waldorf Astoria, and Wallick Hotel, in the Borough of Manhattan, City of New York.

That the business in which deponent is engaged is that of buying and selling theatre tickets and tickets of admission to places of amusement; that the said business was established by deponent's father, Thomas J. McBride, 45 years ago, and has continued in business without interruption since its establishment; and that deponent has been associated in this business with his father from 1894 to date, a period of 25 years; that during this entire period of time it has been the policy of the McBride Company to only charge their patrons 50 cents higher than the box office prices on each ticket sold, except on occasions when the McBride agency did not have the tickets desired, in which case customers were warned if they insisted on purchasing through the McBride agency particular tickets it would be necessary to buy them in the open market or some other speculator, and that they would be charged 50 cents over the price paid to the other speculator or in the open market. Ninety-eight per cent. of the business has been conducted on a 50 cent increase over box office rates basis, the exception in the over-charge of prices [fol. 42] above mentioned occurring very seldom.

The deponent's company sells approximately 500,000 tickets per year. The policy of charging a brokerage fee of 50 cents on each ticket sold by deponent's company has resulted in the growth and development of a profitable business enterprise, and which enterprise is now thriving, and the volume of business increasing from year to year.

John McBride.

Sworn to before me this 21st day of January, 1919. John J. Buckley, Notary Public, New York County. New York County Clerk's No. 292. New York County Register's No. 10015. Commission expires March 30, 1920.

ARGUMENT OF COUNSEL

Mr. Marshall: It is conceded that the statement of Mr. Weller, Defendant's Exhibit A that has been put in evidence is a true and correct statement.

Mr. Hogan: We will concede that if Mr. Weller was called he would swear to it.

Mr. Marshall: The statement of Mr. Weller, Exhibit A, is a correct and true statement of the receipts and expenditures of his business.

The Court: If Mr. Weller was called he would testify to the matter in Defendant's Exhibit A in evidence.

Mr. Hogan: We will concede that.

Mr. Marshall: Defendant's case.

Mr. Hogan: People's case.

[fol. 43] Mr. Marshall: I move to dismiss the proceeding and discharge the defendant on the grounds:

First. The proof adduced by the People does not sustain the complaint.

Second. The proofs do not establish the commission of an offense under any statute of the State of New York.

Third. Chapter 590 of the Laws of 1922, upon which the complaint herein is based and with violation of which defendant is charged, is unconstitutional and void, and each and every section thereof is unconstitutional and void, under Article 1, Section 6, of the Constitution of the State of New York, and the Fourteenth Amendment to the Constitution of the United States, in that it:

(A) Deprives the defendant of his liberty and property without due process of the law by interfering with his following a lawful occupation from which he derives his livelihood with the sale of his services in procuring tickets and with the disposition of tickets acquired by him; and

(B) In that the provisions of said Chapter 590 of the Laws of 1922, relative to the procurement of a license for carrying on the business of a ticket broker, are so interwoven with and dependent upon the provisions of said statute relating to the limitation of the amount which a ticket broker is permitted to charge for tickets as to be unconstitutional and void, because it deprives the owner of such tickets of his liberty and property without due process of law, and the entire statute is thereby rendered unconstitutional and void, under Article 1, Section 6, of the Constitution of the State of New York.

Four. Chapter 590 of the Laws of 1922, upon which the complaint [fol. 44] herein is based, is unconstitutional and void, under Article 1, Section 6, of the Constitution of the State of New York, in that it requires the payment of an excessive license fee.

Five. Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void under Article 1, Section 6, of the Constitution of the State of New York, in that it requires the procurement of a bond as a condition precedent for the issuance of a license to a ticket broker and permits such license to be revoked and such bond to be declared forfeited and to be enforced in the event that the ticket broker follows his lawful occupation to earn a livelihood and sells tickets at a price in excess of that provided by the statute.

JUDGMENT—February 2, 1923

The Court finds the defendant Guilty.

Defendant's Counsel: I take exception to the ruling of the Court.

I move to set aside the Judgment of Conviction and for an arrest of judgment, on all the grounds urged upon the Trial, particularly that the facts stated in the Complaint do not constitute a crime, and that the law applied to the facts here is unconstitutional and void for the reason stated on the motion to dismiss.

Motion denied on each ground.

Defendant's Counsel: Defendant respectfully excepts on each ground.

SENTENCE—February 16, 1923

Before Hons. John J. Freschi, Presiding Justice, Daniel F. Murphy,
Frederic Kernochan, Justices

Sentence.—To pay a fine of \$25 and in default of the payment thereof to stand committed to the City Prison for five days.

[fol. 45]

IN COURT OF SPECIAL SESSIONS

AFFIDAVIT RAPHAEL BRILL

Raphael Brill, being duly sworn says: I am the managing attorney in the office of Guggenheimer, Untermeyer & Marshall, the attorneys for defendant herein. I am familiar with all the proceedings herein. No written opinion was handed down by the Court on the rendition of the decision herein.

Raphael Brill.

Sworn to before me this 9th day of March, 1923. J. George Silberstein, Notary Public, Kings Co., No. 670. King's Register No. 3333. Certificate filed New York County No. 395. New York Register No. 3705. Certificate filed Bronx County No. 51. Bronx Register No. 146. Term expires March 30, 1923.

[fol. 46]

IN COURT OF SPECIAL SESSIONS

CLERK'S CERTIFICATE

I, Joseph F. Moss, Jr., Clerk of the Court of Special Sessions of the City of New York, held in and for the County of New York, do hereby certify that the annexed is a copy of the notice of appeal, stenographer's minutes, and the judgment roll in the case of The People against Reuben Weller, on file in the Clerk's office, and that the same has been compared by me with the original and is a correct transcript therefrom, and of the whole of such original.

Given under my hand and attested by the seal of the said Court this 21st day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-three.

Joseph F. Moss, Jr., Clerk. (Seal.)

[fol. 47] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW
YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS: Please take notice that the above named defendant, Reuben Weller, hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk of said Appellate Division on the 30th day of November, 1923, and a certified copy of which was filed in the office of the Clerk of the Court of Special Sessions of the City of New York on the 1st day of December, 1923, which order and judgment affirmed the judgment of conviction rendered against the above-named defendant in the above-entitled court on the 16th day of February, 1923, convicting the defendant of a violation of Sections 168 and 169 of the General Business Law, added by Chapter 590 of the Laws of 1922, and imposing a fine of \$25.00 and upon failure to pay said fine that [fol. 48] the defendant serve five days in the penitentiary of the County of New York; and the above-named defendant hereby appeals from each and every part of said order and judgment.

Dated, New York, December 3, 1923.

Yours, &c., Guggenheimer, Untermeyer & Marshall, Attorneys
for Defendant.

Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York, N. Y.

To Joab H. Banton, Esq., District Attorney of New York County, Attorney for Plaintiff, Criminal Court Building, New York City, and to the Clerk of the Court of Special Sessions.

[fol. 49]

IN SUPREME COURT

[Title omitted]

JUDGMENT

An appeal having been taken to this court by the defendant from the judgment of the Court of Special Sessions of the City of New York, rendered on the 16th day of February, 1923, and said appeal having been argued by Mr. Louis Marshall, of counsel for the appellant, and by Mr. Robert D. Petty, of counsel for the respondent; and due deliberation having been had thereon.

It is ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. Two of the Justices dissenting.

Enter.

J. P. C.

[fol. 50] IN SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

[Title omitted]

OPINION

Appeal by defendant from a judgment of the Court of Special Sessions of the City of New York rendered on the 16th day of February, 1923, convicting the defendant of a violation of the provisions of the Business Law, Section 168, added by chapter 590 of the laws of 1922.

Louis Marshall, of counsel (James Marshall with him on the brief) for appellant.

Robert D. Petty, of counsel (Felix C. Benvenega with him on the brief; Joab H. Banton, District Attorney) for respondent.

[fol. 51] MARTIN, J.:

The Information charged that the defendant "on the 26th day of October, 1922, at the City of New York, in the County of New York, unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement, and did resell to one John Cuniff a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license therefor, from the Comptroller of the State of New York as required by law." The defendant was convicted and sentenced to pay a fine of twenty-five dollars, or in default of payment thereof, to stand committed to the City Prison for five days.

The General Business Law, Chapter 25, Laws of 1909, was amended by the Laws of 1922, Chapter 590, by inserting therein a new Article X-B, which reads in part as follows:

Theatre Tickets

"Sec. 167. Matter of Public Interest.—It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the State for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

"Sec. 168. Reselling of Tickets of Admission; Licenses.—No person, firm or corporation shall resell or engage in the business [fol. 52] of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon

the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant."

By the terms of the statute under which the defendant was convicted, which became a law April 12, 1922, all persons are prohibited from engaging in the business of reselling theatre tickets, unless they first obtain a license from the State Comptroller. The Act also places a restriction on the price which licensed ticket sellers may charge the public for theatre tickets over the "box office prices," the prices at which they have been purchased by the speculator. The price may not be increased more than fifty cents over that charged by the theatre.

[fol. 53] The constitutionality of this Act is challenged upon the ground that the statute violates the State Constitution and the Federal Constitution. It is asserted by the appellant that the power sought to be exercised by virtue of the statute in question is not within the police power. It is principally contended by defendant that the statute is unconstitutional because of an illegal interference with his calling and because of its price-fixing feature, it being asserted that this feature is so interwoven with the licensing provision that in any event the entire statute must fail.

It is argued for the People that the whole statute is constitutional; that the operation of places of amusement is a matter "affected with a public interest"; that there is a right in the legislature not only to license such places but to fix the prices at which tickets may be resold by a ticket speculator or broker.

The ticket speculator is described and his business explained in *Collister vs. Hayman et al.*, 183 N. Y., 250, at page 254, where the Court said:

"A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it a part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may [fol. 54] not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least \$4,000 a year from his business.

That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the City of New York are equally successful, the additional expense to theatre-goers must be very large."

There seems to be ample evidence that the calling of the ticket speculator has been associated with certain abuses, and all efforts to remedy these, we are told, have been in vain. The managers of theatres profess to be unable to cope with the evil, asserting that they have made efforts to do so. Governor Miller, when signing the act now under consideration, gave expression to a popular sentiment when he said the bill was aimed at "an undoubted abuse." The Legislature of this State has said in passing this Act that there is a great necessity therefor. The Act was prefaced by the following paragraph:

"It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the State for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

An excerpt from the opinion in the case of *People vs. Newman*, 109 Misc., 622, at page 660, another one of the cases now under [fol. 55] consideration, also indicates the necessity for legislation to remedy the admitted abuses. The Court said:

"I am not unappreciative of the fact that this ordinance was passed in answer to a wide-spread public demand to prevent ticket brokers from charging extortionate prices for admission to theatres where popular entertainments are produced, the result being that persons of ordinary means find it almost impossible to purchase tickets for such plays or are required to wait weeks, if not months, before the privilege is accorded to them to witness such performances at a reasonable price.

"Both the theatre and the ticket speculator thrive because the public is willing to pay any excessive price that may be asked.

"There is no doubt that the evil flowing from this business should be corrected, but the relief, unfortunately, for the reasons already pointed out, cannot come through the courts for the courts are merely the interpreters of the law. In California and Illinois the people have sought to remedy a similar situation, but the legislation was declared to be unconstitutional.

"The remedy, in my judgment, can come from the producing managers of the theatres. This can be accomplished through the medium of a contract entered into between the producing managers of the theatres and ticket brokers to sell tickets at reasonable prices. This arrangement can be made effective if the parties will act in good faith. Fixing reasonable prices for theatre tickets will not violate the law of monopoly because entertainments of the stage

[fol. 56] do not come within the inhibition of the anti-monopoly law. In fact, the entire subject is within the absolute control of the producing managers of the theaters as was pointed out in *Collier vs. Hayman*."

Further evidence of abuses which flow from the business of ticket speculating is furnished by the legislation that has been passed in a number of the states, aimed at improving the conditions surrounding the sale and distribution of tickets.

In the City of Chicago the people were confronted with similar abuses, and a law enacted to provide a remedy was upheld in the case of *People ex rel. Cort Theatre vs. Thompson*, 283 Ill., 87. At page 90 the Court, passing on the validity of an ordinance of the City of Chicago, said:

"The question to be determined is whether, in granting a license to conduct a place of public amusement subject to regulation and the police power, a provision that the licensee shall not enter into an arrangement with ticket brokers or scalpers under which the licensee and the ticket brokers or scalpers both represent that the ticket brokers or scalpers are independent dealers and owners of tickets when in reality they are not owners but confederates, and the ticket brokers or scalpers sell the tickets at higher prices for the joint benefit of the licensee and themselves, and by means of falsehood and misrepresentation that all tickets to a performance have been sold a portion of the public are required to pay higher prices for the same accommodations than others, is an invasion of rights [fol. 57] guaranteed by the State and Federal Constitutions."

Places of amusement may be licensed. It has been held that the operation of a theatre is subject to the power of the State or Municipality to require a license. In the case of *People vs. King*, 110 N. Y., 418, at pages 427, 428, the Court said:

"By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them to do so. The business of conducting a theatre or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the Legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.

"The statute in question assumes to regulate the conduct of owners or managers of places of public resort in the respect mentioned. The principle stated by Waite, Ch., J., in *Munn vs. Illinois*, supra, which received the assent of the majority of the court, applies in this case. 'Where,' says the Chief Judge, 'one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must

submit to be controlled by the public for the common good, to the [fol. 58] extent of the interest he has thus created.' In the judgment of the Legislature, the public had an interest to prevent race discrimination between citizens, on the part of the persons maintaining places of public amusement, and the *quasi* public use to which the owner of such a place devoted his property, gives the Legislature a right to interfere."

In *Aaron vs. Ward*, 203 N. Y., 351, at page 356, the Court held that the business of conducting a theatre was not a strictly private business. In *Lemieux vs. Young*, 211 U. S., 489, it was held that the prevention of fraud is always a proper purpose for the enactment of laws regulating a business or occupation.

Although the theatre may serve many useful purposes, its most important functions are the promotion of public welfare and education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore, the theatre becomes more essential to the welfare of the public; it becomes more "affected with a public interest."

Historically considered, theatres may be regarded as "affected with a public interest." A. E. Haight in his book, "The Attie Theatre," at page 4 said:

"To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have thought it unwise to abandon to private ventures an institution which possessed the educational value and wide popularity of the drama."

[fol. 59] That there is ample justification for licensing those engaged in reselling theatre tickets appears to be beyond question. Ordinarily tickets are not resold at the theatre. One purchasing them from a speculator must rely upon him in many respects. If the speculator is dishonest he may sell tickets which will not be honored at the theatre, or tickets for which there is no production to be seen. The purchaser is not on an equal footing with the speculator, and this gives the public an interest in seeing that those engaged in that occupation are persons of character suited thereto, and also in having safeguards provided which will insure protection to the public as well as an adequate remedy to those defrauded.

The overwhelming evidence shows an abuse. It is the duty therefore of governmental agencies to meet the conditions and find a remedy. It is idle to say that the State and City are powerless to prevent fraud and extortion in the resale of theatre tickets. The evils of theatre ticket speculating are undisputed. The street speculator in particular has become a nuisance. His purpose is to prey on the people by selling his tickets at an extortionate price.

A statute which requires a ticket speculator to obtain a license

and thus protect the public is constitutional. In *People ex rel. Armstrong vs. Warden*, 183 N. Y., 223, at page 226, the Court said:

"All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience and general welfare or the prevention of fraud or immorality."

[fol. 60] The rule was laid down in *People vs. Beakes Dairy Co.*, 222 N. Y., 416, at page 427, where the Court said:

"Any trade, calling or occupation may be reasonably regulated if 'the general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them.'"

It appears from the record in this case that the control of admission tickets to theatres and other places of public amusement is largely in the hands of a comparatively small number of the so-called ticket speculators or brokers. They constitute in a large measure the distributors of theatre tickets to the general public. Millions of tickets are sold annually to the public by the speculators. Frequently they purchase the most desirable part of the house for the whole season. Any regulation, therefore, relating to the sale of tickets for admission to theatres and places of public amusement, which does not take into account the persons who in practice control admission to such places, would be of little value so far as the general public interest are concerned. It is, therefore, clearly a business subject to legislative control and regulation.

In the face of the overwhelming and undisputed evidence of an abuse, we are told that the sole remedy must come from the producing managers of the theatre. To concede that, there is no cure for the evil excepting through a remedy initiated by the managers of theatres, would be to admit that, on account of constitutional restrictions, the State in this instance is without power to promote the general welfare of the People by legislating to meet the evil, [fol. 61] to accomplish a plain governmental purpose.

In *People ex rel. Durham R. Corp. vs. LaFetra*, 230 N. Y., 451, the Court after adverting to the conditions which called for a remedy, said:

"Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage in the face of the extraordinary and unforeseen public exigency, which the Legislature has, on sufficient evidence found to exist.

The conclusion is, in the light of present theories of the police power, that the State may regulate a business however honest in

itself, if it is or may become an instrument of widespread oppression (*People vs. Beakes Dairy Co.*, supra, and cases cited; *Payne vs. Kansas*, 248 U. S., 112); that the business of renting homes in the City of New York is now such an instrument and has, therefore, become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (*Marcus Brown Holding Co. vs. Feldman*, 269 Fed. Rep., 306)."

The chief attribute to the police power is that it is flexible and adaptive, that it expands to meet new conditions and keeps pace with new developments (*Eubank vs. City of Richmond*, 226 U. S., [fol. 62] 137, 142; *Hadacheck vs. Los Angeles*, 239 U. S., 394, 410). The rights of the community are the supreme consideration to which those of the individual must yield. As said by the Court in *Union Dry Goods Co. vs. Georgia, P. S. Corp.*, 248 U. S., 372, 375:

"That private contract rights must yield to the public welfare, where the latter is approximately declared and defined and the two conflict, has been often decided by this court."

We find many exercises of this power in recent times which formerly might have been considered of doubtful validity. A striking instance of this broadening of the police power and a departure from earlier decisions is the case of *Klein vs. Maravelas*, 219 N. Y., 383, 384, 386, where the Court, construing the sales in bulk law, said the decision in the earlier case of *Wright vs. Hart*, 182 N. Y., 330, was wrong. The latter case had been decided about ten years before *Klein vs. Maravelas*.

The situation in relation to the statute now under review is in many respects similar to that of the act passed to prevent fraudulent sales in bulk, which law was known as the "Sales in Bulk Law." The sole purpose of that law was to remedy an admittedly widespread evil and prevent fraud. When the statute first came before the Court of Appeals it was held unconstitutional. Thereafter courts in many of the States of the Union, the Federal Courts, and the United States Supreme Court, held similar statutes constitutional.

The court of Appeals of this State, in the case of *Klein vs. Maravelas*, supra, then held a sales in bulk law constitutional, and said:

[fol. 63] "Since *Wright vs. Hart* was decided, the validity of like statutes has been upheld in two cases by the United States Supreme Court, *Lemieux vs. Young*, 211 U. S., 489; *Kidd Dater & Price Co. vs. Musselman Grocery Co.*, 217 U. S., 461. Objection to this statute on the ground of conflict with the federal constitution has thus been removed. We have still to determine, however, whether there is any conflict with our State constitution; and that requires us to say whether we shall adhere to our decision in *Wright vs. Hart*.

We think it is our duty to hold that the decision in *Wright vs.*

Hart is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright vs. Hart*, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (*Wright vs. Hart*, *supra*, at page 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state." * * *

The reasoning of the dissenting opinion in *Wright vs. Hart*, 182 N. Y., 330, written by Judge Vann, which was afterwards referred to with approval by the United States Supreme Court in the case of *Lemieux vs. Young*, 211 U. S., 489, sustains the validity of the act now before the Court. It was said by him:

"The question before us is one of power, not of policy. Courts may pass upon the power of the legislature, but not upon its policy. [fol. 64] Statutes, whether wise or unwise, are equally binding upon us, provided no provision of either Constitution is molested. According to the general rule, unless there is a plain conflict between a statute and the constitution, the statute stands, for every presumption is in its favor. * * *

"Starting always with the presumption that the statute, although challenged, is valid, we study it in connection with the constitution to see whether there is such a conflict as to divest the legislature of jurisdiction. If purporting to be passed in the exercise of the police power, we endeavor to see, first, whether there was an evil to be remedied and, secondly, whether the remedy prescribed is 'calculated, intended, convenient or appropriate' to suppress it and not designed to trespass upon personal rights 'under the guise of a police regulation.' * * * The police power cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property, 'but a statute does not work such a deprivation in the constitutional sense, simply because it imposes burdens or abridges freedom of action, or regulates occupations or subjects individuals or property to restraints in matters indifferent, except as they affect public interest or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted.'"

In the case now before the Court, the evil having been proved beyond all question, the legislature properly found a remedy. [fol. 65] The opinion of Judge Vann indicates that the remedy is a proper one. He says at page 354:

"The legislation under consideration was intended to suppress a deep-seated evil, common in sales of a certain kind. The existence of the evil is admitted, and the right of the legislature to provide a remedy is also admitted, but it is insisted that the remedy provided is so unreasonable that it violates the primary guaranties of

the Constitution. The same claim was made when a maximum price was fixed for doing a certain kind of work, but it was rejected, because the work was done in a business affected with a public interest. (*People vs. Budd*, supra). The same position was taken when one state absolutely prohibited sales on margin and another options to buy or sell at a future time, contracts which were previously valid, but both provisions were sustained by the Supreme Court of the United States, because they tended to prevent gambling. (*Booth vs. Illinois*, supra, and *Otis vs. Parker*, supra.) While many contracts of the kind prohibited were free from wrong, as so many were made for the purpose of gambling, all were swept away, the good and bad alike. Is gambling a worse evil than fraud? Does it affect commerce more seriously? Is freedom of contract interfered with more by requiring notice to creditors before certain sales are made, than by forbidding certain other sales altogether? The statute is intended to interfere only with those who buy or sell in bad faith toward the creditors of the vendor. It doubtless interferes with some who act in good faith, but so do the other statutes referred to. In order to prevent injustice and fraud, legislation for [fol. 66] time out of mind has placed some restraint upon commercial transactions, and where the legislature has jurisdiction to act the method of suppressing the evil is wholly within its sound discretion."

In a case such as is now before the Court the police power should be exerted to protect the public.

The construction of a statute similar to the one before the Court, which had for its sole object the prevention of frauds and abuses which were generally known, was upheld by the United States Supreme Court. That statute interfered with the freedom of contract, but the Court said:

"That the Court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the State, we think is too clear to require discussion. As pointed out by Vann, J., in a dissenting opinion delivered by him in *Wright vs. Hart*, 182 N. Y., 350, the subject has been, with great unanimity, considered not only to be within the police power, but as requiring an exertion of such power" (*Lemieux vs. Young*, supra).

In the case of *People ex rel, Armstrong vs. the Warden*, supra, at page 226, it was held that a statute passed solely for the prevention of fraud was a valid enactment. In *People vs. Beakes Dairy Co.*, 222 N. Y., 416, at page 427, the Court held that the State might regulate a business, however honest, which might become a source of fraud. An appropriate method of meeting evils which result from the carrying on of a business is licensing on terms pre-[fol. 67] scribed by law (*State vs. Conlon*, 33 Atl. Rep., 519-521).

The State in this case is not prohibiting the carrying on of any business, nor is it discriminating against particular persons or a

particular class. Any person, wishing to do so, may engage in the business of reselling tickets, but only after obtaining a license in conformity with the regulations imposed by law, one of the conditions being that he must file a bond to guarantee the fulfilment of the obligations prescribed by statute.

The method now pursued in the disposal or resale of tickets was described at the trial. It is interesting in that it shows a community of interest between the theatre managers and the brokers who sell to the public or an underwriting of the attraction by the speculator for which the public must pay. The hope of expectation that the abuses or evils in theatre ticket speculation may be remedied by the producing managers is dispelled by the testimony in this case.

David Marks testified that he was in the business of selling tickets for thirty years and was well acquainted with the ticket brokerage business; that it had been carried on for over sixty years; and that the pioneer in the business was George Tyson. He further testified that the "general way in which the business is carried on is that we have charge accounts with various people in the City of New York and outside of New York and we also do a cash business. A charge of fifty cents is maintained in the large offices in the City of New York. We are compelled to buy merchandise months in advance and if the show is a poor show, the loss is ours. We look upon these tickets as merchandise. We get the tickets from the theatre managers. We buy them in blocks. Each office is allowed [fol. 68] so many seats. The theatre managers put on a production. They say to the ticket brokers that they will allow them to have a certain number of tickets for that production. That arrangement is made before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy. We are sent for by the managers of the various productions and the theatre owners and they say, "We are to produce a show four weeks from next Monday night and it is going to open at a certain theatre," and they say, "how many seats do you want for that show for eight weeks in advance." We have asked for time to see how many we could use for that particular theatre, but in many cases we are not given time and we must purchase the number of tickets buying and paying for them eight weeks in advance, when we don't know the name of the show or the cast, and we are compelled to buy them at four and five dollars apiece, plus the war tax, and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars. In other words we finance the theatrical performance and we have to pay in advance. It takes hundreds of thousands of dollars. If the play is not successful the tickets are left on our hands. We have a return privilege of 25, sometimes 15 and sometimes 10. They (speaking of theatre managers or owners) allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets. We have a private

telephone to the theatre. We deliver tickets to the theatre or send them to your home or leave them at your downtown office, or you [fol. 69] stop for them on your way home. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service."

This testimony gives an idea of the theatre ticket business which is carried on by the brokers, and how intimately connected it is with that of the theatre and theatre owners and managers.

It is apparent from this record that the theatres and ticket brokers have an understanding or arrangement for the resale of tickets. The modern method of selling tickets indicates that there is a working agreement between the managers or owners and the speculator or ticket brokers.

By the terms of the statute in question the ticket speculator is permitted to carry on his business and is permitted to make a reasonable profit. The act is therefor not confiscatory. It is not attacked upon the ground that it is confiscatory or that it prevents a fair profit.

A witness for the defendant on his direct examination testified that for services rendered a ticket broker makes a charge of fifty cents; that the established rate of profit "is fifty cents, we are not allowed to charge more." This testimony referred to the increase over the box office prices of tickets obtained directly from the theatre. It is established on the record that the advance of fifty cents is the amount customarily taken by the speculator for himself, over the price he pays for the ticket. In the business itself it is established that this is a reasonable charge for the service rendered by him [fol. 70] so that it was shown in this case that the statute does not tend to have a confiscatory effect.

In *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S., 362; at page 398, interpreting the decision of *Budd vs. New York*, 143 U. S., 517, it is said:

"Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appears that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground."

It is true that the testimony is that on a resale of a theatre ticket bought from another agency the speculator still adds fifty cents for his services. This does not make it unreasonable to limit the speculator who handles the tickets to a service charge of fifty cents per ticket; for were it to be justified, the process of rehandling the tickets and adding additional charges could go on indefinitely, to the defeat of all regulation of this kind.

This combination of theatre owner or manager with speculator or broker by which the attraction is financed or underwritten by the ticket broker or speculator, tends to a monopoly which prevents

the public from seeing the performance on any reasonable terms. Under the circumstances disclosed, the regulation of the business of reselling tickets would seem not only a necessary, but also a proper means of meeting the evils sought to be remedied.

In *People ex rel Cort Theatre Co. vs. Thompson*, supra, at page [fol. 71] 97, the Court said:

"The question here is whether the constitution protects a theatre owner in a scheme by which an applicant for a ticket is told that the house is sold out, and upon going to the ticket scalper is permitted to select the part of the house where he desires to sit and the ticket scalper turns to the telephone and directs the theatre to send up a ticket, which is sent and sold at an advanced price.

The business of the theatre owner or manager is private in the sense that no franchise from the State is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses or other shows and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites everyone to enter, does so only for the purpose of selling to each individual services or merchandise."

In *Budd vs. New York*, 143 U. S., 517, the Court said:

"In *Sinking Fund Cases*, 99 U. S., 700, 747, Mr. Justice Bradley, who was one of the Justices who concurred in the opinion of the court in *Munn vs. Illinois*, speaking of that case said: 'The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power.' Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice Bradley regarded as the principle of the decision of *Munn vs. Illinois*."

In *Ratcliff vs. Wichita Union Stock Yards Co.*, 74 Kansas, 1, at page 7, the Court said:

"Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. In *Munn vs. Illinois*, 94 U. S., 113, 21 L. Ed., 77, Chief Justice Waite, referring to the right to regulate business under the police power said: 'The Government regulates the conduct of its citizens one toward another, and

the manner in which each shall use his own property, when such regulation becomes necessary for the public good' (page 125). Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theatres, wharves, markets, warehouses for the storage [fol. 73] of grain and tobacco, common carriers, the collection and distribution of news, and the business of supplying and distributing water and gas. Some of these rest upon considerations of health, or the safety or the convenience of the people, but all fall within the general grounds of public necessity and public welfare."

In *Booth vs. Illinois*, 184 U. S., at page 429, the Court said:

"* * * If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the Courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler vs. Kansas*, 123 U. S., 623, 661; *Minnesota vs. Barber*, 136 U. S., 313, 320; *Brimmer vs. Rebman*, 138 U. S., 78; *Voight vs. Wright*, 141 U. S., 62."

The right to fix reasonable rates to protect the public follows when a business is affected with a public interest.

In *Block vs. Hirsh*, 256 U. S., 135, at page 157, the Court said: [fol. 74] "But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn vs. Illinois*, 94 U. S., 113."

In the case of *People ex rel. Durham R. Corp. vs. La Fetra*, 230 N. Y., 429, at page 445, the Court said:

"Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. *Lincoln Trust Co. vs. Williams Bldg. Corp.*, 229 N. Y., 313; *St. Louis Poster Advertising Co. vs. City of St. Louis*, 249 U. S., 269. Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money, are common. The power of regulation exists, however, and it is not limited to public uses or to property where the right to demand and

receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest and the question is whether the subject has become important enough for the public to justify public action. *Munn vs. Illinois*, 94 U. S., 113; *German Alliance Ins. Co. vs. Kansas*, 233 U. S., 389; *Oklahoma Operating Co. vs. Love*, 252 U. S., 331; *Holter Hardware Co. vs. Boyle*, 263 Fed. Rep., [fol. 75] 134; *American Coal Min. Co., vs. Special C. & F. Com.*, *supra*."

See also, *Union Dry Goods Co. vs. Georgia P. S. Corp.*, 248 U. S., 372, at page 375; *Manigault vs. Springs*, 199 U. S., 473, at page 480.

In *Atlantic Coast Line R. R. Co. vs. City of Goldsboro*, 232 U. S., 548, the Court said:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In *Munn vs. Illinois*, 94 U. S., 113, at page 126, the Court said:

"* * * Property does become clothed with a public interest when used in a manner to make it of public consequence, and effect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

[fol. 76] At page 134, the Court further said:

"* * * The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rate at will, and compel the public to yield to his terms, or forego the use."

In *Rast vs. Van Deman & Lewis Co.*, 240 U. S., 342, at page 366, the Court said:

"That case illustrated the reach of power of government to protect or promote the general welfare. It sustained a provision of the constitution of the State of California which made void all contracts for the sale of stock of corporations on margin or to be delivered at a future day. The practice had been common. Its evil was disputed. It was attempted to be justified by argument very

much like those advanced in the case at bar, but this Court decided that the legislative judgment was controlling."

That the Legislature may fix a reasonable maximum charge for the service where the matter is one in which the public has an interest, has been settled by the decision in *Munn vs. Illinois* (supra). The *Munn* case has frequently been followed, approved and extended. (*Budd vs. New York*, 143 U. S., 517; *Brass vs. Stoser*, 153 U. S., 391; *German Alliance Ins. Co. vs. Kansas*, 233 U. S., 389; *Wileox vs. Consolidated Gas Co.*, 212 U. S., 19.)

[fol. 77] One of the chief evils of the business of ticket speculation is the exaction of exorbitant rates on the part of ticket speculators. This evil has been recognized for many years.

The principle that the Legislature has a right to interfere in such a case was clearly stated in *Radeliff vs. Stock Yards Co.*, 74 Kansas 1, as follows:

"Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like, and circumstances, affecting property with a public interest. Police regulations of the business of dealing in patent rights have been maintained on the theory that it affords great opportunity for imposition and fraud. (*Mason vs. McLeod*, 57 Kan., 105; 45 Pac., 76; 41 L. R. A., 548; 57 Am. St. Rep., 327; *Allen vs. Riley*, 71 Kan., 378; 80 Pac., 952)."

In *German Alliance Ins. Co. vs. Kansas*, supra, the language of the Court was as follows:

"The cases need no explanatory or fortifying comment. They demonstrate that a business by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People vs. Budd* (117 N. [fol. 78] Y., 1, 27) that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds, such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'"

Reliance is placed by the Court below on three cases and it is said that they are decisive of the case now before the Court. An examination of the authorities relied upon shows that they are not in point. One case arose in California. In that case, *Ex Parte Quarg*, 149 Cal., 79, the Court was passing upon a statute which provided that it was a misdemeanor to sell or offer to sell a theater ticket at a price in excess of that ordinarily charged by the management.

That statute absolutely prohibited by indirection, the business of ticket broker or speculator, and prohibited anyone who bought a ticket from reselling it at any price beyond that which the theatre charged, allowing no compensation whatever for the service rendered in furnishing the ticket.

The other cases relied upon, namely, *People vs. Steele*, 231, Ill., 340, and *People vs. Powers*, 231, Ill., 560, arose in Illinois. There were very much limited by a subsequent decision of the same Court, *People ex rel. Cort Theater vs. Thompson*, *supra*, where the Court said:

"This latter case clearly points out the distinction between the Steele case, the Powers case and the case now before the Court. In [fol. 79] the Steele case, like the Quarg case in California, the ordinance prohibited the sale of tickets for more than the price printed thereon. In the Powers case the ordinance did likewise."

The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that anyone who wishes to carry on the business of reselling tickets, must do so after he obtains a license, and that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets.

This act regulates the charges of the speculator or broker. It prohibits those who have a monopoly of the tickets, made possible by arrangements with the theatres, from charging extortionate fees for "service" in securing and selling tickets.

We are of the opinion, therefore, that the law as enacted was not only within the Police Power, but that it was the duty of the Legislature to legislate on the subject.

We have therefore reached the conclusion that the entire statute is constitutional.

This defendant is charged with a specific crime, the crime of unlawfully reselling a ticket to a theatre or place of amusement without a license permitting such resale, in violation of the law. It was [fol. 80] proved that he did not have a license and it nowhere appears that he ever applied for one or that an application made by him was denied. There is no question but that this defendant resold theatre tickets without securing a license, and committed the acts charged in the Information.

The defendant was properly found guilty of the crime charged, and the judgment of conviction should be affirmed.

Smith and McAvoy, JJ., concur.

Clarke, P. J., and Finch, J., dissent.

IN COURT OF SPECIAL SESSIONS

CLERK'S CERTIFICATE

I, Joseph F. Moss, Jr., Clerk of the Court of Special Sessions of the City of New York, held in and for the County of New York, do hereby certify that the annexed is a copy of the notice of appeal to Appellate Division, stenographer's minutes and the judgment roll, opinion of Appellate Division, including both affirming and dissenting opinions, notice of appeal to Court of Appeals and order and judgment of affirmance in the case of the People against Reuben Weller, on file in the Clerk's Office, and that the same has been compared with the original and is a correct transcript therefrom, and of the whole of such original.

Given under my hand and attested by the seal of the said Court this 7th day of December, in the year of our Lord, One Thousand nine hundred and twenty-three.

Joseph F. Moss, Jr., Clerk. (Seal.)

[fol. 81]

IN COURT OF APPEALS

OPINION—February 19, 1924

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

REUBEN WELLER, Appellant

Appeal from a judgment of the appellate division affirming a judgment of the Court of Special Sessions of the city of New York convicting the defendant of unlawfully violating the provisions of section 168 of the General Business Law (reselling tickets).

Louis Marshall for appellant.

Joab H. Banton, District Attorney (Robert D. Petty of counsel), for respondent.

Joseph S. Auerbach for intervener.

LEHMAN, J.:

The defendant has been convicted upon an information which charged that he "unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement and did resell to one John Cuniff, a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license thereof from the comptroller of the state of New York as required by law." He does not deny that he has committed the acts charged in the information, but he contends that the provisions of the General Business Law

(Cons. Laws, ch. 20), which seek to regulate the business of reselling tickets of admission to theatres and places of public amusement transcend the power of the legislature and are unconstitutional and void. These provisions were inserted in the General Business Law (sections 167 to 174) by chapter 590 of the Laws of 1922. They prohibit any person, firm or corporation from engaging "in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller." Each applicant for a license is required to file with the application therefor a bond in the penal sum of one thousand dollars conditioned that the obligor will not be guilty of any fraud or extortion and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by the statute. In case of a breach of the condition of the bond, suit may be brought to recover upon the bond, and in addition the comptroller is empowered to revoke the license. The statute further provides that "no licensee shall resell any such ticket * * * at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, [fol. 82] games, contests, or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation."

The business of reselling tickets of admission to places of public amusement has always been regarded as a lawful business which serves the convenience and promotes the comfort of persons who desire to purchase at convenient times and places tickets which otherwise they could purchase only at the office established by the management of the places of amusement for the sale of tickets in advance of the performance until the full supply of tickets should be disposed of. The statute has not rendered the business unlawful, but it seeks to confine the business to persons obtaining a license, and to restrict drastically the price at which tickets may be resold. Such restrictions interfere with the liberty of those desiring to engage in that business and are lawful only if imposed by the legislature in the exercise of what has come to be described as the "police power."

The time has probably passed when any useful purpose can be served by further discussion of the general nature of the police power or even in most cases by citation of general definitions, though contained in opinions which we might consider authoritative. When the attempted exercise by the legislature of the power to regulate certain kinds of business and especially to fix prices was first challenged in the courts, the courts laid down the general rule that the power to regulate and fix prices depends upon whether the business is so "clothed with a public interest" as to justify reasonably

the imposition of regulations calculated to remove abuses, or perhaps even to secure benefits, in regard to features which clearly affect the public. This general rule is now well recognized but the limits of its application are still somewhat shadowy and indefinite. As the court pointed out in *Wolff Packing Co. v. Industrial Court* (262 U. S. 522, at page 538): "All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction." In the case of *People v. Budd* (117 N. Y. 1, at page 15) this court, speaking through Judge Andrews, in pointing out similar considerations, said:

"It must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the method of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We [fol. 83] have no hesitation in declaring that unless there are special conditions and circumstances which bring the business * * * within principles which, by the common law and practice of free governments, justify legislative control and regulation in the particular case, the statute * * * cannot be sustained."

Decisions of this and other courts since that time have merely tended by the process of inclusion and exclusion to indicate the nature of the "special conditions and circumstances" which may bring a business within principles which justify legislative control and regulation, and these cases may be referred to profitably only in so far as the "special conditions and circumstances" considered therein are analogous to the special conditions and circumstances under consideration by us.

The courts have frequently pointed out that the business of conducting a theatre or place of public amusement is "affected with a public interest" and it is urged by the People that by reason of this public interest the legislature may regulate the price of theatre tickets and that the business of reselling theatre tickets is so closely connected with the business of conducting the theatre that the legislature may likewise regulate the price that may be demanded or received upon the resale of tickets by "brokers" or "speculators." "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. * * * It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. * * * The extent to which regulation may reasonably go varies with different kinds of Business." (*Wolff Packing Co. v. Industrial Court*, supra, p. 539.) In *People v. King* (110 N. Y. 418) this

court by Andrews, J., pointed out that though the business of conducting a theatre or place of public amusement is one in which any one may engage in the absence of any statute or ordinance, yet the right of the legislature to regulate the licensing of theatres and shows and to "enforce restrictions relating to such places in the public interest" has never been challenged, and that "the quasi-public use to which the owner of such a place devoted his property, gives the legislature a right to interfere" when "in its judgment the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement." Again in *Aaron v. Ward* (203 N. Y. 351) the court pointed out that the business of maintaining a theatre cannot be regarded as strictly private but has always been held subject to legislative control (citing cases). Yet obviously the mere fact that the public interest in preventing race discrimination between citizens in places of public [fol. 84] resort or in the maintenance of good order in such places justifies legislative regulation which will reasonably tend to serve the public interest in these respects, is by no means decisive of the question of whether abuses reasonably to be feared from unrestricted and unregulated resales of theatre tickets, so closely effect the public interest as to place the regulation of the business of reselling tickets within the legislative control to the extent of permitting the legislature to limit the price which may be demanded or received upon such resale.

Section 167 of the statute recites that "it is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses." The declaration of the legislature that the price or charge for admission is a matter affected with the public interest is not conclusive upon the courts; for the courts must in each case decide whether in fact the public interest justifies an attempted restriction by the state upon the liberty of its citizens. Not the assertion of the legislature but only the actual existence of conditions which would justify the exercise of legislative control, must be the basis of a valid exercise of the police power. Yet the indication by the legislature of its own purposes may certainly in some degree guide the courts in their consideration of the validity of the legislative assertion of power.

Statutes and ordinances prohibiting the resale of theatre tickets at an advance over the price printed on such tickets have been held unconstitutional in *People v. Steele & Altschul* (231 Ill. 340); *City of Chicago v. Cowers* (231 Ill. 560); *Ex parte Quarg* (149 Cal. 79). All these decisions are to some extent based upon the view that in effect the purpose of the statute was to fix prices. (See dissenting opinion in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, at page 431.) In all these cases the reasoning of the court seems to rest upon two premises: First, that the business of conducting a place of amusement is essentially a private business and the legislature has

no more power to fix the prices that may be demanded or received in that business than it would have to regulate the price that may be demanded or received by a tailor, an artisan or a merchant upon the sale of services or commodities. Second, that the business of reselling tickets of admission is a lawful business performing a useful service and that any person carrying on such business should be left free to contract for the performance of such service with any person who desires to avail himself of the service afforded by such business. [fol. 85] In passing it may be remarked that in the case of *People v. Thompson* (283 Ill. 87) the court stated that "the business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses or other shows and amusements which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites everyone to enter does so only for the purpose of selling to each individual services or merchandise." Whether the public character of the places of amusement pointed out in this distinction is, in itself, sufficient to give the legislature power to control the prices which may be charged by the proprietor of a place of public amusement has not even been considered by us, for the present statute does not attempt to fix the price which may be charged by the proprietor, but merely requires him to "print on the face of each such ticket or other evidence of the right of entry, the price charged therefor" by him. No theatre proprietor is now challenging that provision so we are not called upon to express any opinion concerning its validity, though a similar provision in an ordinance of the city of Chicago was sustained in the case of *People v. Thompson* (*supra*). The question of whether the public is so interested in gaining admission to places of public amusement that any person who assumed to furnish tickets of admission to the public has subjected himself to the control of the legislature in regard to the price he may demand or receive; or in other words, whether the interest of the public in obtaining admission for a reasonable price is such that a statute which regulates the price instead of leaving the price to be fixed by free agreement, might reasonably be said to promote the public welfare, is determinative of the validity of the statute now under consideration only if the real abuse which the legislature has found exists, or is reasonably to be feared, and which the legislature seeks by the statute to remedy or avoid, is the abuse of unreasonably high or "exorbitant rates" charged for a quasi-public service. The legislature has, however, pointed out that the statute is enacted "for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses" and we may profitably consider in the first place whether "extortion" or exorbitant prices exacted by oppression instead of fixed by free agreement, is not the real abuse which the legislature is seeking to remedy,

and if so whether the legislature has the power to remedy the abuse of "extortion" by price regulation.

We are, of course, not confining the word "extortion" to the definition [fol. 86] tion of the crime of extortion in the Penal Law, for the legislature could not have intended it in that narrow sense. We mean, and we think the legislature intended, by that word, the exaction of money made possible because of oppressive conditions or circumstances as distinguished from the receipt of money as a result of free negotiations an willingly paid for a service or commodity. In the present case a witness, produced by the defendant himself, testified that those engaged in the business of reselling tickets are compelled by theatre managers, even before the first performance of a new play, to buy and pay for seats eight weeks in advance. They dispose of approximately two million theatre seats a year, or at least half of the seats in the orchestra of the various theatres, and at times the pay commissions or bonuses to the management to obtain seats. Persons desiring seats near the front cannot obtain them at the box office of the theatre. "The best they could get for any show is the fifteenth or sixteenth row." Under these circumstances it cannot be doubted that when ticket brokers or speculators are permitted to charge any price which they can obtain from a buyer upon the resale of tickets of admission, abuses are not only reasonably to be feared, but actually exist. Indeed the courts have recognized the existence of abuses, due to these conditions, even before this statute was enacted by the legislature. Without unnecessarily multiplying quotations from opinions of the courts, we may point out that in *Collister v. Hayman* (183 N. Y. 250, 254) this court stated: "A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least \$4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators carrying on the same business at various theatres in the city of New York are equally successful, the additional expense to theatre-goers must be very large." The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, will leave the patrons of the theatre "to the mercy of speculators." The liberty of the individual citizen to contract freely should be jealously guarded even from encroachments by the state, and where barter is free and demand creates supply perhaps economic laws and not the fiat of the state is the proper corrective of exorbitant prices; but where the liberty of the in-

dividual citizen to contract freely has been restricted by the circumstance that a man or group of men has obtained control of the supply of a commodity which the public desires or commonly uses, and this control is used to compel the individual to pay any price which may be demanded though that price be far beyond the price which would be fixed by free contract between consumer and producer, a legislative mandate which regulates the exercise of the compulsive force may in effect restore and not diminish the liberty of the individual.

The ancient statutes against "engrossing" and "forestalling" were essentially examples of such legislative mandates. Through them Parliament sought to preserve freedom of trade by prohibition of acts which tend to restriction of free competition between the traders themselves, and "to prevent any man or set of men from possessing the power to arbitrarily determine the price at which an article of common use shall be sold because he who controls prices is the master of the world." (*State v. Duluth Board of Trade*, 107 Minn. 506, at page 529.) Experience and modern economic opinion based on that experience have so demonstrated the unwisdom of many of these statutes that a court to-day might hesitate to sustain as a reasonable exercise of the police power some of the restrictive statutes which seemed obviously proper centuries ago, yet the power of the legislature in a proper case to "promote the public welfare" by regulating or restricting acts which interfere with free negotiation between the consumers and producers of a commodity in common use and impede the operation of the laws of supply and demand should not be doubted (see opinion of Chief Justice White in *Standard Oil Co. v. United States*, 221 U. S. at pages 50 to 58), and we see no distinction in principle between commodities and privileges or licenses, such as tickets of admission, if there exists a general public demand for them and they are in common use. It may be impossible, and it certainly would be unwise, to attempt to define in general terms the circumstances which may justify legislative intervention or the degree of regulation which is reasonable, but in the present case the fact that the business of conducting places of public amusement has always been regarded as affected with a public interest, at least to the extent that it is "competent for the State to impose the condition that the proprietor shall admit or accommodate all persons impartially" (*Cooley on Torts* [2d ed.], 336); the evidence that the ticket brokers or speculators at least in the city of New York, with or without the [fol. 88] concurrence of the theatre managers, purchase in advance so many of the seats in the orchestra of all the theatres that the general public cannot purchase at the box office seats in the first fifteen rows and are compelled to purchase these seats, if at all, from the ticket brokers; and the fact that the public desire for admission to places of amusement is so great that exorbitant prices for tickets of admission far beyond those charged by the producers can be extorted from the general public by reason of this control of the supply by the brokers, in our opinion clearly justify reasonable restrictions by the legislature upon the business of reselling such tickets. The legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men

for services which at least in part are not desired by the public especially where such acts occur in a business which is measurably affected with a public interest. The correction of recognized abuses need not be left to the voluntary action of the very group of men who have created the abuse and who apparently believe that the continuance of such abuses will profit them.

The sole question which we must still consider is whether the regulation of the legislature is reasonable. The statute does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above. It permits the brokers to charge an advance of fifty cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale. It does not prohibit the producing manager from charging the public all that the public will pay, but leave the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy. The question of whether the business of conducting places of public amusement is so "affected with a public interest" as to justify the regulation of the price of admission in order to insure the right of the public to admission for a reasonable charge is not directly involved in this decision. But even if we were to assume that the interest of the public in such business is not in itself sufficient to justify regulation of price, yet a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of control of the supply should not be condemned merely because the legislature has seen fit to use price regulations as the instrument which may accomplish the desired purpose. Even though the ultimate purpose of statutes which regulate prices may be the protection of the public from excessive charges, alike where the price regulation is directed against the abuse of extortion through control of supply, by one who does not produce the supply, and where the price regulation is directed against the alleged abuse of unreasonably high prices secured by a producer through negotiation; yet in the one case the statute restricts the freedom of the individual in the performance of acts which though perhaps lawful are calculated to injure others, while in the other case the statute restricts the freedom of the individual in the performance of acts which are of such benefit to the public that even the price to be

charged for them is a matter of public concern. The special conditions and circumstances in the one case may bring a business within principles which by the common law and practice of free governments justify legislative control and regulation though such control might not be justified merely by the public character of the business. The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of public in connection with a business which is at least to some degree affected with a public interest. The legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the legislature the responsibility of determining whether the remedy is wise and will promote the public welfare. The courts are called upon to determine only whether the legislature has acted within its powers in enacting this legislation; the judges have no disposition, and the courts have no right, to pass upon the wisdom of its exercise.

For these reasons the judgment of the Appellate Division should be affirmed.

Hiscock, Ch. J., Cardozo, Pound, McLaughlin and Crane, JJ., concur; Andrews, J., dissents.

Judgment affirmed.

[fol. 90]

IN COURT OF APPEALS

[Title omitted]

REMITTITUR—February 20, 1924

Be it remembered that on the 12th day of December in the year of our Lord One thousand nine hundred and twenty-three, Reuben Weller, the appellant in this cause, came here unto the Court of Appeals, by Guggenheimer, Untermeyer & Marshall, his attorneys, and filed in the said Court a Notice of Appeals and return thereto from the Order and Judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, affirming the judgment of Conviction of the Court of Special Sessions of the City of New York, and the People of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Joab H. Banton, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

[fol. 91] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Louis Marshall, of counsel for the appellant, and by Mr. Robert D. Petty, of counsel for the respondent, and after

due deliberation had thereon, did order and adjudge that the Judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York, there to be proceeded upon according to law.

Therefore it is considered that the said Judgment be affirmed, as aforesaid.

And hereupon as well as the Notice of Appeal and return thereto aforesaid by it given in the premises, are by the said Court of Appeals, remitted into the Court of Special Sessions of the City of New York, before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Court of Special Sessions, before the Justices thereof, etc.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

[fols. 92 & 93]

IN COURT OF APPEALS

CLERK'S CERTIFICATE

February 20, 1924.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 94]

IN COURT OF APPEALS

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes Reuben Weller, by Louis Marshall, Esq., his attorney, and says that on February 23rd, 1924, the Court of Special Sessions of the City of New York, State of New York, made and entered a final judgment herein whereby it was adjudged that said Reuben Weller, the Plaintiff-in-Error, was guilty of a violation of Chapter 590 of the Laws of 1922 of the State of New York, and that he be convicted of a violation of the same and sentenced to pay a fine of Twenty-five Dollars (\$25) and in default of the payment thereof to stand committed to the City Prison of the City of New York for five days, and further says that in the proceedings had in his cause prior thereto certain errors were committed to the prejudice of the Plaintiff-in-Error, all of which will more in detail appear from the Assignments of Error filed with this petition.

This action was brought in the Court of Special Sessions of the City of New York, State of New York, on an Information by Joab H. Banton, the District Attorney of the County of New York, accusing the Plaintiff-in-Error of violating Chapter 590 of the Laws of 1922 of the State of New York. Judgment was entered February 16, 1923, adjudging the Plaintiff-in-Error to be guilty of a misdemeanor in violating said statute and convicting him to pay a fine [fol. 95] of Twenty-five Dollars (\$25), or in default of such payment, that he stood committed to the custody of the Keeper of the City Prison of the City of New York until such fine was paid but not exceeding five days. An appeal was thereupon taken from said judgment to the Appellate Division of the First Department of the Supreme Court of the State of New York which on the 30th day of November, 1923 affirmed the judgment of the Court of Special Sessions of the City of New York. An appeal was thereupon taken to the Court of Appeals of the State of New York, which is the highest court in said State in which a decision in this cause could be had. Thereafter the said Court of Appeals adjudged that the order of the Appellate Division so appealed from and the judgment of the Court of Special Sessions of the City of New York be affirmed and directed that the proceedings in this cause be remitted to the Court of Special Sessions of the City of New York to be proceeded upon according to law. The record of the Court of Appeals and the Remittitur from said Court was duly filed with said Court of Special Sessions of the City of New York, where said record now remains; whereupon such judgment was entered in the office of the Clerk of the Court of Special Sessions of the City of New York, State of New York, on the 23rd day of February, 1924.

Wherefore petitioner prays that a Writ of Error may issue in his behalf from the Supreme Court of the United States to the Court of Appeals of the State of New York and the Court of Special Sessions of the City of New York, State of New York, for the correction of the errors and a reversal of the judgment so complained of, that a transcript of the record, proceedings and orders in this case, only [fol. 96] authenticated, be sent to the Supreme Court of the United States, that the amount of the security which the petitioner shall give and furnish on said Writ of Error may be fixed, and that upon the giving of such security all further proceedings in the Court of Special Sessions of the City of New York, State of New York, be suspended and stayed until the decision of said Writ of Error by the Supreme Court of the United States.

Dated New York, March 25, 1924.

Reuben Weller, Petitioner, by Louis Marshall, His Attorney
and Counsel.

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes Reuben Weller, Plaintiff-in-Error in the above entitled cause, by Louis Marshall, his attorney, and says that in the record and proceedings in this cause there is manifest error in this, to-wit:

First. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 is a constitutional act.

Second. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State [fol. 98] of New York did not deny to the plaintiff-in-error the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. In that the Court of Appeals of the State of New York erred in adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his lawful occupation and livelihood without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sixth. In that the Court of Appeals of the State of New York erred in failing to adjudge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff-in-error of his liberty and property without due process of law, and denied to him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Seventh. In that the Court of Appeals of the State of New York erred in refusing to render judgment in favor of the plaintiff-in-error on the ground that Chapter 590 of the Laws of 1922 of the State of New York was unconstitutional and void because it deprived the plaintiff-in-error of his liberty and property without due process of law and denied to the plaintiff-in-error the equal protection of the

law under Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it:

(A) Deprives the plaintiff-in-error of his liberty and property without due process of law by interfering with his following a lawful occupation from which he derives his livelihood by the sale of his services in procuring tickets and by the disposition of tickets acquired by him;

[fol. 99] (B) In that the provisions of said Chapter 590 of the Laws of 1922, relative to the procurement of a license for carrying on the business of a ticket broker, are so interwoven with and dependent upon the provisions of said statute relating to the limitation of the amount which a ticket broker is permitted to charge for tickets as to be unconstitutional and void because it deprives the owner of such tickets of his liberty and property without due process of law, and the entire statute is thereby rendered unconstitutional and void;

(C) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void in that it requires the payment of an excessive license fee;

(D) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void, in that it requires the procurement of a bond as a condition precedent for the issuance of a license to a ticket broker and permits such license to be revoked and such bond to be declared forfeited and to be enforced in the event that the ticket broker follows his lawful occupation of earning a livelihood by selling tickets at a price in excess of that provided by the statute.

Wherefore, for these and other manifest errors, appearing in the record, Reuben Weller, the Plaintiff-in-Error, prays that the judgment entered in the Court of Special Sessions of the City of New York, State of New York, and affirmed by the Appellate Division [fol. 100] of the First Department of the Supreme Court of the State of New York and by the Court of Appeals of said State be reversed and set aside and held for naught, and that judgment be rendered for the Plaintiff-in-Error herein granting to him his rights under the laws and Constitution of the United States, and particularly the dismissal of the complaint and the setting aside of the judgment of guilty found against him in this cause.

Louis Marshall, 120 Broadway, New York City, N. Y., Attorney and Counsel for Plaintiff in Error.

[fol. 101]

IN COURT OF APPEALS

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

Comes now Reuben Weller, Plaintiff-in-Error above-named this 26 day of March, 1924, and files and presents his petition pray for the allowance of a Writ of Error intended to be urged by him and praying further that a duly authenticated transcript of record, proceedings and papers upon which the judgment he was rendered may be sent to the Supreme Court of the United States and that such other and further proceedings may be had in premises as may be just and proper.

And it appearing upon a consideration of the said petition that this action there has been drawn in question the validity of a statute of and authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States and that the decision rendered by the Appellate Division of the First Department of the Supreme Court and by the Court of Appeals of the State of New York, the highest Courts of said State in which a decision in this cause could be had, was in favor of the validity of a statute of and of an authority exercised under the State of New York, it is

Ordered that a Writ of Error be allowed as prayed; provided, however, that Reuben Weller, the Plaintiff-in-Error, give bond according to law in the sum of Two hundred and fifty Dollars (\$250) which said bond shall operate as a supersedeas.
[fol. 102] In testimony whereof witness my hand this 26 day of March, 1924.

Frank H. Hiscock, Chief Judge of the Court of Appeals
of the State of New York.

[fols. 103 & 104] BOND ON WRIT OF ERROR FOR \$250—Approved and
filed; omitted in printing

[fol. 105]

IN COURT OF APPEALS

[Title omitted]

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the Court of Appeals of the State of New York and of the Court of Special Sessions of the City of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Court of Special Sessions of the City of New York, State of New York, after a decision rendered in said cause by the Appellate Division of the First Department of the Supreme Court of the State of New York and by the Court of Appeals of said State of New York, they being the highest courts of law and equity of said State in which a decision could be had in an action between Reuben Weller, Plaintiff-in-Error, and The People of the State of New York, Defendant-in-Error, wherein was drawn in question the validity of the statute of and authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States and the decision rendered in said cause was in favor of their validity, and manifest error has happened to the great damage of the said Reuben Weller as by his petition appears:

We, being willing that error, if any, have happened, shall be at [fol. 106] once corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty (30) days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord One thousand nine hundred and twenty-four.

Alex. Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York. (Seal of District Court of the United States, Southern District of N. Y.)

Allowed by: Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[fol. 107 & 108] CITATION—In usual form, showing service on John Banten; omitted in printing

[fol. 109] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

CLERK'S CERTIFICATE

I, Joseph F. Moss, Jr., Clerk of the Court of Special Sessions of the City of New York, held in and for the County of New York, by virtue of the annexed Writ of Error which was served upon me on the 27th day of March, 1924, and in obedience thereto, do hereby certify that the foregoing contain a true and complete transcript of the record and proceedings had in the case of The People of the State of New York against Reuben Weller mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors, the Allowance of the Writ of Error, the Bond, the Citation and the said Writ of Error served upon me, together with the admission of service of the said papers.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed and I have hereunto set my hand, at my office in the City and County of New York the 29th day of March, 1924.

Joseph F. Moss, Jr., Clerk of Court. (Seal of the Court of Special Sessions of the City of New York.)

Endorsed on cover: File No. 30,240. New York Court of Special Sessions of the City of New York. Term No. 349. Reuben Weller, plaintiff in error, vs. The People of the State of New York. Filed April 2, 1924. File No. 30,240.

FILE COPY

FILED

APR 13 1925

WM. R. SINGER
CLERK

Supreme Court of the United States

OCTOBER TERM 1924.

NO. 349.

REUBEN WELLER,

Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,

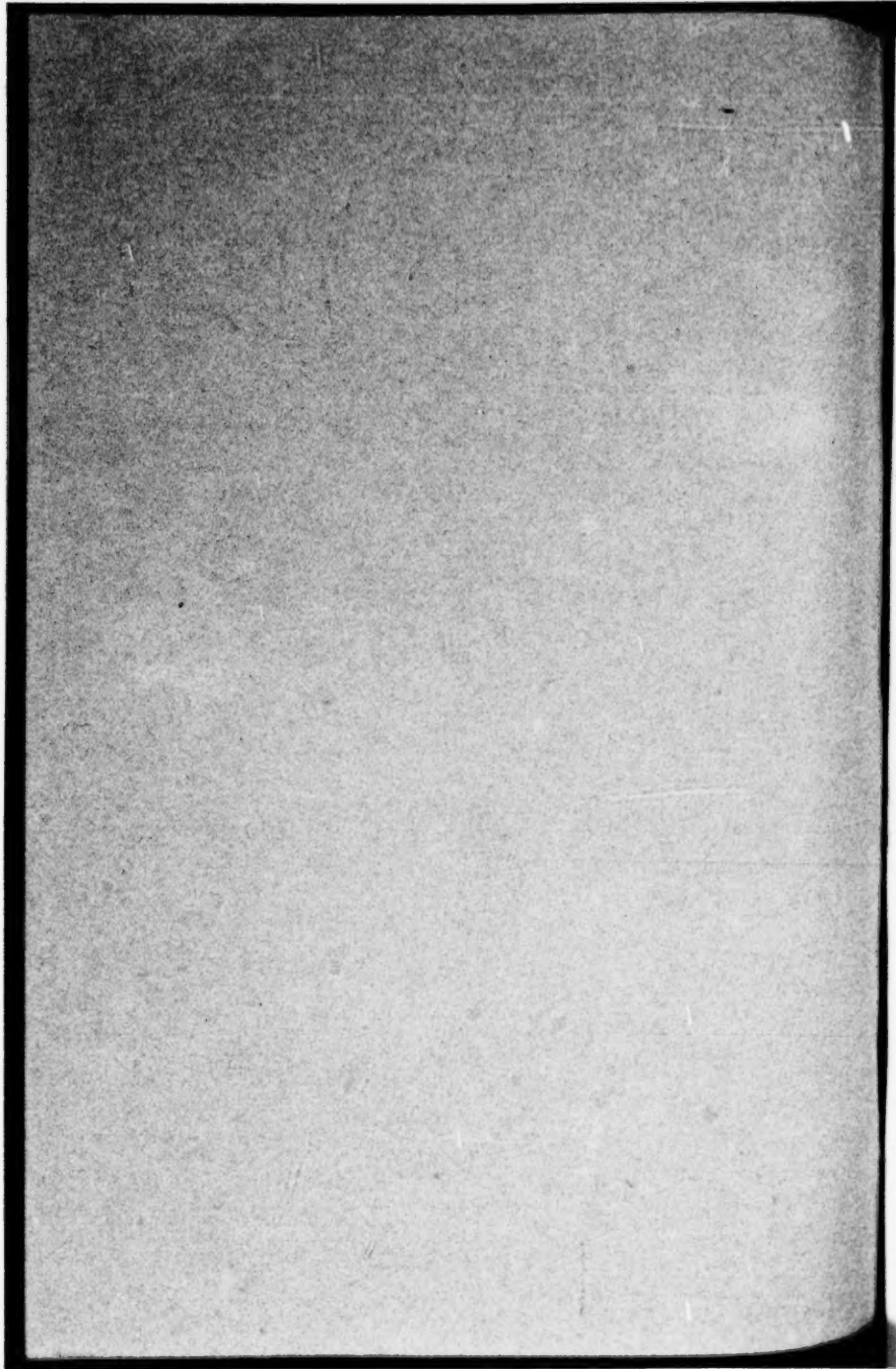
Defendants-in-Error.

IN ERROR TO THE COURT OF SPECIAL SESSIONS OF THE CITY OF
NEW YORK, STATE OF NEW YORK.

POINTS FOR PLAINTIFF-IN-ERROR.

✓
LOUIS MARSHALL,

Of Counsel.



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Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 349.

REUBEN WELLER,
Plaintiff-in-Error,
against

THE PEOPLE OF THE STATE OF
NEW YORK,
Defendants-in-Error.

In Error to
the Court of
Special Ses-
sions of the
City of New
York, State
of New York.

POINTS FOR PLAINTIFF-IN-ERROR.

This is a criminal action brought by the People of the State of New York against Weller, the plaintiff-in-error, on an information filed in the Court of Special Sessions of the City of New York for an alleged violation of Sections 168 to 174 of the General Business Law, added by Chapter 590 of the New York Laws of 1922, in that Weller was engaged in the business of selling theatre tickets without a license and without filing a bond, as required by the statute (*Rec.*, pp. 1, 2, 28). Judgment of conviction was rendered on February 16, 1923, imposing a fine of \$25 or imprisonment for five days upon the failure to pay such fine.

On appeal from this judgment the Appellate Division of the Supreme Court on November 30, 1923, rendered judgment of affirmance, and on a further appeal to the Court of Appeals that Court likewise affirmed the judgments of the lower courts. The record was thereupon filed in the Court of Special Sessions and judgment was rendered there against the plaintiff-in-error on the remittitur from the Court of Appeals (*Rec.*, pp. 54, 55).

No opinion was written by the Court of Special Sessions. The opinion of the Appellate Division, from which Presiding Justice Clarke and Mr. Justice Finch dissented, is reported in 207 App. Div. Rep. at pages 337 to 354.

The opinion of the Court of Appeals, from which Judge Andrews dissented, is reported in 237 N. Y. at pages 316 to 332.

The constitutionality of the act claimed to have been violated is challenged on the grounds stated at pages 25-26 of the Record.

For the convenience of the Court the text of the act follows:

The Statute Challenged.

"Sec. 167. *Matters of public interest.* It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

"Sec. 168. *Reselling of tickets of admission; licenses.* No person, firm or corporation shall resell or engage in the business of re-

selling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

“Sec. 169. Bond. The comptroller shall require the applicant for a license to file with the application therefor a bond in due form to the people of the state of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the state of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this

article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction *and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.*

"Sec. 170. *Revocation of licenses.* In the event that any licensee shall be guilty of any fraud or misrepresentation or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

"Sec. 171. *Supervision of comptroller.* The comptroller shall have the power, upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

"Sec. 172. *Restriction as to price.* No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhi-

bitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

"Sec. 173. *Violations; penalties.* Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed *and filing of a bond required by this article* shall be guilty of a misdemeanor. *Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.*

"Sec. 174. *Constitutionality of article.* In case it is judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.

"Sec. 2. This act shall take effect immediately."

The Nature of the Service Rendered by Ticket Brokers.

The business of ticket brokerage has been carried on in the City of New York for more than sixty years. A considerable number of responsible men are engaged in it (*Rec.*, p. 5). They maintain offices in hotels and other prominent localities, for the convenience of their patrons, where they engage bookkeepers, stenographers, salesmen and messengers (*Rec.*, p. 8). They operate private telephones to the various theatres and have attendants upon the telephones to facilitate communication. They secure for their patrons

such tickets as they desire, in so far as they are procurable and, wherever practicable, deliver them at the homes or places of business of the purchasers (*Rec.*, p. 9). If they themselves are not possessed of the tickets called for they secure them from those who on inquiry are found to have them, if they are to be had (*Rec.*, p. 9). They carry charge accounts for their regular customers, to whom they extend credit. They serve those who are hard of hearing or whose eyesight is bad and who would not be apt to get the accommodations suited to their infirmities at the theatre box office (*Rec.*, p. 10). They also supply tickets to out of town customers and to strangers stopping at the various hotels, who otherwise would be unable to secure tickets on short notice (*Rec.*, p. 11).

The persons dealing with the brokers are thus spared the insufferable annoyance and the serious loss of valuable time incident to standing in line at the box offices of the various theatres, to discover eventually that the theatre is unable to supply them with seats in the locations desired, or for the evening suiting their convenience or preference (*Rec.*, pp. 10-11).

The expense of carrying on the business of the broker is very large. One of the brokers testified that his annual disbursements amount to \$156,000 (*Rec.*, p. 8), and that he sustains large losses annually because of his inability to dispose of tickets which he has been compelled to purchase by the theatre managers, and from the fact that he permits his customers to return any tickets supplied, until 8 o'clock of the evening to which they relate (*Rec.*, pp. 11-12).

The ticket brokers to a great extent are compelled to help the theatre owners to finance their productions. When a new play is to be produced,

even before anything is known as to its qualities or as to who is to appear in it, the theatrical managers require the brokers to buy a designated number of tickets for eight weeks in advance (*Rec.*, pp. 5, 6, 7) at a price fixed by the managers. These tickets are paid for in advance by the brokers to the extent of hundreds of thousands of dollars annually. If the play for which tickets are allocated by the theatrical managers is not a success, a large proportion of the tickets is left on the brokers' hands with resultant financial loss. In many instances the play continues, even though it be unpopular, at the expense of the brokers (*Rec.*, p. 8).

So far as their customers are concerned the brokers render valuable service, and no complaints are made by those who obtain the benefit of such service.

As indicative of the necessity of maintaining a large staff to conduct the business, David Marks testified that for every seven persons who come into his place of business or who communicate with him over the telephone, only one sale is made, owing to the fact that he is unable to comply with their requirements, most of them desiring front seats for some selected and usually popular performance on a designated evening (*Rec.*, p. 8).

The result of Weller's operations from January 1, 1921, to October 31, 1922, shows that his business was conducted at a considerable loss (*Rec.*, pp. 13, 14).

The Action of Governor Miller on the Bills of 1921 and 1922.

At the Legislative session of 1921 a bill similar to the act now under consideration was passed by

the Legislature but was vetoed by Governor Miller in the following memorandum:

"State of New York
Executive Chamber
Albany

February 28, 1921.

"To the Assembly:

"I return herewith without my approval, Assembly Bill, Int. No. 158, Pr. No. 158, entitled—

‘An Act to amend the general business law, in relation to the sale of tickets of admission to theatres and places of amusement.’

"Theatre tickets are articles of commerce (*People ex rel. Tyroler vs. Warden of Prison*, 157 N. Y., 116; *Collister vs. Hayman*, 183 N. Y., 250; *People ex rel. Fleischmann vs. Caldwell*, 168 N. Y., 671). Any attempt by the State, therefore, to regulate the price at which theatre tickets may be sold or resold, must be in the exercise of police power. No ground for such exercise has been called to my attention. Although I stated on the oral argument before me that my impressions were against the constitutional validity of the bill and gave time for the filing of briefs, my attention has not been called to any grounds upon which exercise of power can be supported and I am unable to discover any.

"Justice Rosalsky in the case of *Matter of Newman*, 109 Misc., 622 decided that a municipal ordinance which provided for a license to engage in the business of selling tickets of admission to exhibitions or performances and forbidding a licensee to sell a ticket for any greater amount than fifty cents in excess of the regular established price was invalid. *The reasons given by Justice Rosalsky in support of his conclusion are applicable to this bill and*

appear to me to be so cogent as to permit no other conclusion.

I am satisfied that this bill is unconstitutional and it is, therefore, disapproved.

(Signed) NATHAN L. MILLER."

In 1922, whilst formally approving the act now attacked, Governor Miller expressed his views as to its constitutionality in the following memorandum:

"State of New York
Executive Chamber
Albany

April 22, 1922.

Memorandum filed with Senate Bill, Introductory Number 598, Printed Number 1193, entitled—

‘AN ACT to amend the general business law, in relation to the sale of tickets of admission to theatres and places of amusement.’

Approved:

This bill is like one disapproved by me last year in the respect that it limits the price at which a theatre ticket broker may re-sell a ticket. It differs from that in the respect that it provides for licensing such brokers and declares that the subject-matter is affected with a public interest.

The licensing feature by itself is undoubtedly valid. I thought that the limitation upon the re-sale price was invalid, and although I invited the sponsors of the bill last year to submit a brief in support of the constitutionality of the bill, none was forthcoming. Eminent counsel have recently submitted to me a brief containing at least plausible arguments in support of the bill. I have concluded to

give them a chance to address these arguments to a court, inasmuch as the bill is aimed at an undoubted abuse and at least one provision of it is probably valid.

The bill is approved.

(Signed) NATHAN L. MILLER."

Assignments of Error.

The plaintiff-in-error filed the following assignments of error (*Rec.*, pp. 56-57) viz. that the court below erred.

First. In adjudging that Chapter 590 of the Laws of 1922 is a constitutional act.

Second. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his liberty without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deprive the plaintiff-in-error of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fourth. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not deny to the plaintiff-in-error the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. In adjudging that Chapter 590 of the Laws of 1922 of the State of New York did not

deprive the plaintiff-in-error of his lawful occupation and livelihood without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Sixth. In failing to adjudge that Chapter 590 of the Laws of 1922 of the State of New York deprived the plaintiff-in-error of his liberty and property without due process of law, and denied to him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Seventh. In refusing to render judgment in favor of the plaintiff-in-error on the ground that Chapter 590 of the Laws of 1922 of the State of New York was unconstitutional and void because it deprived the plaintiff-in-error of his liberty and property without due process of law and denied to the plaintiff-in-error the equal protection of the law under Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it:

(A) Deprives the plaintiff-in-error of his liberty and property without due process of law by interfering with his following a lawful occupation from which he derives his livelihood by the sale of his services in procuring tickets and by the disposition of tickets acquired by him;

(B) In that the provisions of said Chapter 590 of the Laws of 1922, relative to the procurement of a license for carrying on the business of a ticket broker, are so interwoven with and dependent upon the provisions of said statute relating to the limitation of the amount which a ticket broker is permitted to charge for tickets as to be unconstitutional and void because it deprives the

owner of such tickets of his liberty and property without due process of law, and the entire statute is thereby rendered unconstitutional and void;

(C) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void in that it requires the payment of an excessive license fee;

(D) In that Chapter 590 of the Laws of 1922, upon which the complaint herein is based, is unconstitutional and void, in that it requires the procurement of a bond as a condition precedent for the issuance of a license to a ticket broker and permits such license to be revoked and such bond to be declared forfeited and to be enforced in the event that the ticket broker follows his lawful occupation of earning a livelihood by selling tickets at a price in excess of that provided by the statute.

POINTS.

I.

Chapter 590 of the Laws of 1922 is unconstitutional and void because it deprives the defendant of his liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

That the business of a ticket broker is a lawful one, that the pursuit of it cannot be prohibited, directly or indirectly, and that theatre tickets,

constitute property in the constitutional sense of the term, has been expressly adjudicated.

People ex rel. Tyroler vs. Warden of the City Prison, 157 N. Y., 116;

People ex rel. Fleischmann vs. Caldwell, 64 App. Div., 46; affd. 168 N. Y., 671;

People vs. Marks, 64 Misc. Rep., 679;

Collister vs. Hayman, 183 N. Y., 250;

Matter of Newman, 109 Misc. Rep., 622.

In the opinion rendered by Judge Lehman in the case now under review this is conceded. He says (237 N. Y., 320, 321):

“The business of reselling tickets of admission to places of public amusement has always been regarded as a lawful business which serves the convenience and promotes the comfort of persons who desire to purchase at convenient times and places tickets which otherwise they could purchase only at the office established by the management of the places of amusement for the sale of tickets in advance of the performance until the full supply of tickets should be disposed of.”

The central idea of this bill is to prohibit the owner of a ticket from selling it at a price which will be more than fifty cents in excess of the price stamped thereon by the owner of the theatre.

By Section 167 of the Statute it is announced that the price of or charge for admission to theatres, places of amusement or entertainments, is a matter affected with a public interest and subject to the supervision of the State, for the purpose of safeguarding the public against fraud, extortion, exorbitant rates, and similar abuses. The draftsman is evidently proceeding on the theory

that by means of a mere shibboleth or talismanic formula, that which is essentially a matter of private concern can be metamorphosed from its real character into one of public concern, despite the numerous decisions in which it has been adjudged to the contrary.

The Legislature has made no attempt to regulate the prices charged by middlemen or retailers in the sale of clothing, drugs or food products or to limit the price of labor, or of books. It is unreasonable to suggest that "the price of or charge for" theatre tickets is "affected with a public interest" when the Legislature regards the prices of the staples and necessities of life, the wages of mechanics and laborers, the salaries of corporate officials and employees and the fees of doctors and lawyers as being unaffected by "public interest" or as being beyond the pale of its regulatory power.

Section 168 provides that no person, firm or corporation *shall resell*, or engage in the business of reselling any ticket of admission or any other evidence of the right of entry to a theatre, etc., without having first procured a license therefor from the Comptroller, paid an annual fee of \$100 and given such information as the Comptroller may require, however inquisitorial.

Section 169 requires the applicant to file with his application a bond in the penal sum of \$1,000 with two or more sureties, who shall be freeholders of the State of New York, *conditioned, among other things, that the obligor "will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article"* (referring to Sections 168 and 172). A suit to recover on the bond may be

brought by the Comptroller, or on the relation of any party aggrieved, and in the event that the obligor named in such bond has violated any of the conditions of such bond recovery for the full penal sum may be had in favor of the people of the State.

By Section 170 it is set forth that in the event that any licensee "shall charge for any ticket a price in excess of the price authorized by this article," necessarily referring to Section 172, the Comptroller is empowered to revoke the license on notice and an opportunity to answer the charge.

Section 171 requires every licensee, on request of the Comptroller, to supply such information as may be required concerning his business, business practices or business methods.

Section 172, which is the essential provision, with which all of the previous sections are by express reference, as above shown, intimately bound up and inextricably interwoven, declares:

"No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, etc., *at a price in excess of fifty cents* in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, etc., shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry, the price charged therefor by such person, firm or corporation."

Section 173 makes the violation of any provision of the article a misdemeanor.

We have already said that tickets are property. They are bought and sold. They have a market value. That the business of dealing in tickets is lawful has already been shown. Those engaged in

it pursue an occupation of great usefulness. They render a service to that part of the public desiring to attend the theatre or the opera on short notice, that would otherwise be likely to be disappointed in its efforts. They save their patrons the loss of time and the irritation resulting from the delay in being served at the box offices of the theatres to which they desire admission. Strangers who sojourn at the many hotels and who seek for innocent amusement would find it practically impossible at the height of the theatrical season to attend a performance of the character they desire but for these agencies, which are to be found in the principal hotels, or in communication with them. Residents of other cities are enabled, through these brokers, to arrange by telegraph or telephone for the purchase of tickets in anticipation of their coming to the city.

Some of these brokers have been engaged in this business for fifty years. In order to serve the public, they are obliged to rent expensive offices. Many of them have entered into leases for long terms. They employ assistants and bookkeepers and messengers. It is necessary for them to keep telephones and clerks to operate them so that they may be in communication with their patrons, with the theatres and with the public generally. What they charge is for their services. Each broker has his regular clientele, many of whom have running accounts with the broker, just as they would with any other kind of middleman through whom they may purchase merchandise or secure service of any kind.

By restricting these brokers in the price that they shall charge for their tickets (which constitute a marketable commodity) or for their serv-

ice (which is likewise a property right), by depriving them of their liberty of entering into contracts for the sale of such property or the rendition of the services which they are requested and able to render, the due process clause of the Constitution is effectually violated. There is nothing immoral or intrinsically wrong in the business which these men conduct.

That there is nothing inherently wrong in selling tickets or rendering service in connection with the procuring of tickets and making a charge of more than fifty cents in excess of the price marked on the tickets, clearly appears from recent Congressional legislation concerning the Internal Revenue.

By the Revenue Act of October 3, 1917 Sec. 700 (Fed. Stat. Ann. 1918 Supp., p. 354) a tax of one cent for each ten cents or fraction thereof of the amount paid for admission to any place of entertainment or amusement, was provided for.

By the Act of February 24, 1919 (40 Stat. L. 1057, Sec. 800; Fed. Stat. Ann. 1919 Supp., p. 158), it was provided that there was to be paid "upon tickets or cards of admission to theatres, operas and other places of amusement sold at news-stands, hotels and places other than the ticket offices of such theatres, operas or other places of amusement at not to exceed fifty cents in excess of the sum of the established price therefor at such ticket offices, plus the amount of any tax imposed under paragraph (1)", which is the normal tax payable by the theatre or other places of amusement under the Revenue Act of 1917 "a tax equivalent to five per centum of the amount of such excess; and if sold for more than fifty cents in excess of such established price plus the

amount of any tax imposed under paragraph (1), a tax equivalent to fifty per centum of the whole amount of such excess."

It was also provided in the same statute that "a tax equivalent to fifty per centum of the amount for which the proprietors, managers or employees of any opera house, theatre or other place of amusement sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor" was to be paid.

The provisions last referred to were re-enacted in the Revenue Act of 1921 (Sec. 800 Fed. Stat. Ann. 1921 Supp., p. 191).

Neither in the act now under review, nor in any other statute of New York is there any limitation upon the amount that the proprietor, manager or employees of a theatre or other place of amusement may charge for tickets—even though § 172 requires those owning, operating or controlling a theatre to print on the face of the admission tickets issued, the price charged therefor, no obligation is imposed on those connected with the theatre to sell the tickets at the printed price.

Nobody is required to purchase admission tickets to the theatres who does not desire to do so. If the brokers buy tickets in order to supply their customers when there is no demand for them, they are themselves the losers. If the theatrical attraction proves to be unpopular, to the extent that they have in accordance with the requirements of the theatrical managers invested in tickets for such performance the loss falls upon them and not on the public. Their relation to the theatre-goers is in no sense different from that of the haberdasher, the hatter, the dressmaker, the hotel keeper, the commission merchant, the jeweler, the

mechanic, the farmer, or the day laborer to those whom they respectively serve. It is no less an infraction of their right to liberty and property than it would be if the men belonging to any of these other categories were to be limited by statute or ordinance as to the price that they are to receive for the merchandise in which they deal or the service which they render. Such legislation savors of the ancient days when the tyrannical Statute of Laborers sought to fix in a rigid mould the compensation that those who labored on the farm and in the workshop were to receive, and of that species of legislation which limited the prices at which the products of the soil and of the industry of the artisan were permitted to be sold.

It will be interesting in this connection to refresh one's recollection regarding the Statutes of Laborers enacted 23 and 25, Edward III (1349 and 1350), and the enactments of 5 Elizabeth, c. 4, as to the compensation of handicraftsmen, servants and artificers, and the prices at which farm produce and other merchandise might be sold. They are collated in Chapter I of the monograph by the late Albert Stickney, a prominent member of the New York bar, entitled "*State Control of Trade and Commerce*" (printed in 1897).

Like the present act these statutes also began with recitals; the first of them proclaimed:

"Because a great part of the people and especially of workmen and servants late died of the pestilence, many seeing the necessity of masters and great scarcity of servants will not serve unless they receive excessive wages * * * we, considering the grievous incommunities, which the lack especially of ploughmen and such laborers

may hereafter cause, have * * * ordained: (p. 10).

The second (pp. 15, 16) referring to the enactment of 1349 as being aimed "against the *malice* of servants * * * not willing to serve after the pestilence without taking excessive wages" declared that it had been ordained "that such manner of servants, as well men as women should be bound to serve receiving salary and wages accustomed in places where they ought to serve in the twentieth year of the reign of the King that now is, or five or six years before * * * and now for as much as * * * the said servants having no regard to the said ordinance, but to their ease and singular *covetise*, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year and before, to the great damage of the great men and impoverishing all of the said commonalty * * * wherefore * * * to refrain the *malice* of the said servants * * * be ordained:

Not only were the acts of the laborers inveighed against, characterized as *covetise* and *malice*, but also as "coactions and manifest extortions" (p. 13).

In 1564, Parliament (5 Eliz. c. 4) still continued to make recitals of the same character, with the interpolated concession "that the wages and allowances limited and rated in many of said statutes are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said servants and laborers" but still persisted in the tyrannical policy adopted two hundred and twelve years previously. The terms of this statute are instructive (pp. 24 to 35).

The very thought makes one shudder that it was declared by statute that a haymaker was to receive but a penny a day, the mower of meadows but five pence for the acre, and the reaper of corn in the first week of August two pence and thereafter three pence, without meat or drink, (*p. 16*) that none should take for threshing a quarter of wheat or rye over two pence and for the quarter of barley, beans, peas and oats one penny (*p. 17*), that a master carpenter was limited to three pence, a master mason to four pence, and a plasterer to the like amount, without meat or drink, (*p. 17*) that cordwainers and shoemakers shall not sell boots or shoes in any other manner than in the twentieth year of the reign of Edward (*p. 18*) and that because of the dearth of poultry the price of a young capon should not pass three pence, of a hen two pence, of a pullet one penny, and of a goose four pence (*p. 20*). The infraction of personal liberty becomes the more significant when it is considered that it was declared that "every person able in body under the age of sixty years, not having to live on, being required, shall be bound to serve him that doth require him or else committed to the gaol until he find surety to serve," (*p. 10*) and that a violation of these provisions was made punishable with imprisonment (*pp. 11, 18, 19*). So comprehensive was this legislative scheme that it was enacted (*p. 11*) "that no man pay, or promise to pay any servant any more wages, liveries, meal or salary than was wont as afore is said."

Can it be seriously contemplated that, in spite of the constitutional guaranties to secure the liberty of the citizen, we are to restore a system of so nefarious a character as that which prevailed in the evil days when such legislation as that described was enacted and attempted to be enforced?

In the act now under consideration the right of the ticket brokers to carry on their business and to sell their property and their services in the manner indicated, is sought to be curtailed by the mere fiat of the Legislature. The unsoundness of this procedure from the constitutional standpoint is capable of easy illustration. Let us suppose that, instead of relating to theatre tickets, this statute had aimed its shafts at jewelers. Would it be within the purview of the legislative power to say that a licensed jeweler shall not charge more than \$1 in excess of the cost to him of a ring supplied to him by a manufacturer, or that he shall sell his diamonds in accordance with a schedule of prices established by the Legislature based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberly? Again, let us suppose that a licensed vendor of rugs were limited to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings were prohibited from disposing of them at a price exceeding to the extent of \$100 that paid to the artist; or, for that matter, that the licensed artist himself were forbidden to sell at a sum exceeding the cost of the canvas, paint, frame, and five dollars a day for the time spent in the production of his artistic creation. Could such legislation be upheld? The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera.

On the theory of this legislation it would be equally permissible to limit the compensation of lawyers and physicians, of journalists and accountants, of clerks and bookkeepers, the wages of shoemakers and tailors, of carpenters and bricklayers, the commissions of factors and brok-

ers and of agents of every imaginable variety. It would likewise enable the Legislature to fix the prices of food and clothing, of books and magazines, of stone and lumber, of iron beams and copper sheathing, of aeroplanes and automobiles, the profit of the newsboy, of the fruit-vendor, of the barber and the bootblack. Illustrations might be multiplied by the thousands including every branch of industry, agriculture, commerce, or other human activity. In fact the power of the legislature would be supreme and everybody, practically, would be placed in a straight-jacket.

The whole theory of such legislation is vicious and dangerous, and the precedent that would be created by sustaining the act now under consideration would be an invasion of liberty, calculated to work lasting injury not only to the individual but to the public welfare.

The limitations on the power of the Legislature to fix the price of commodities or of services, or to limit the right to contract with regard to them were stated with his accustomed clarity by Judge Andrews, in *People vs. Budd*, 117 N. Y., 15, affd. *sub. nom. Budd vs. New York*, 143 U. S., 517:

"In determining whether the Legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles

which, by the common law, and the practice of free governments justify legislative control and regulation in the particular case, the Statute of 1888 cannot be sustained. That no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

This language was quoted with approval in the opinion of Judge Lehman in the present case (237 N. Y. 322).

The Minimum Wage Case.

The most recent authoritative decision on this proposition which though called to the attention of the Courts below, was not even dignified with notice, is *Adkins vs. Children's Hospital*, 261 U. S., 525.

It involved the constitutionality of an Act of Congress which provided for the fixing of minimum wages for women and children in the District of Columbia. A board was constituted representative of employers, employees and the public. Among its duties was that of ascertaining and declaring standards of minimum wages for women in any occupation within the District of Columbia, "and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health

and to protect their morals." The Act was declared unconstitutional on the ground that the right to contract concerning one's affairs, including that of making contracts of employment and to obtain the best terms one can as the result of private bargaining, is a part of the "liberty" of the individual protected by the Constitution; that this Act arbitrarily interfered with the freedom of contract, and that even though it had been decided in prior cases that, in respect to labor legislation, special consideration was to be given to the physical qualifications of women, those considerations did not apply to legislation which constituted a statutory determination as to the wages to be paid to women for their services.

Speaking for the majority of the Court, Mr. Justice Sutherland made the following comments (pages 554, 558, 560), which are fully as applicable here as they were to the statute to which they were directed:

"It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of protecting themselves as men. *It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect to the price for which one shall render service to the other in a purely private employment where both are willing, perhaps, anxious, to agree, even though the consequence may be to pledge one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. * * * In principle there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy foods, he is morally entitled to obtain*

the worth of his money, but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more, and the shopkeeper having dealt honestly and fairly in that transaction is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sells to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. * * *

"Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes by like course of reasoning the power to fix low wages. If in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future law makers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains a minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employee of his constitutional liberty of contract in one direction will be utilized to strip the employer of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself; it is a precedent, and with the swing of sentiment its bad influence may run from one extremity of the arc to the other."

Among the cases cited in support of the conclusion reached by the Court were *Adair vs. United States*, 208 U. S., 174, 175, and *Coppage vs. United States*, 236 U. S., 14. The language of Mr. Justice Harlan in the first of these cases was quoted by Mr. Justice Sutherland at page 545, as follows:

“The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”

Mr. Justice Sutherland then quoted from the opinion of Mr. Justice Pitney in the second of these cases (pages 545, 546) as follows:

“Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority have no other honest way to begin to acquire property, save by working for money.”

The constitutionality of the act was ineffectually sought to be sustained by the decisions in *Wilson vs. New*, 243 U. S., 322; *Block vs. Hirsh*, 256 U. S., 135, and *Marcus Brown Holding Co. vs. Feldman*, 256 U. S., 170; and *Levy Leasing Co. vs. Siegel*, 258 U. S., 242. These cases were distinguished by Mr. Justice Sutherland (pages 551, 552) on the ground that the legislation there attacked was temporary in its operation and was passed to meet a sudden and great emergency because the parties affected for the time being *could or would not agree*; while in the case under consideration, as well as in the present case, *the parties were forbidden to agree*.

The Court then referred to the decision in *Pennsylvania Coal Co. vs. Mahon*, 260 U. S., 393, 416, where Mr. Justice Holmes, after saying:

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"

added:

"The late decisions upon laws dealing with the congestion of Washington and New York; caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law, but fell far short of the present act."

See also:

Fisher Co. vs. Woods, 187 N. Y., 90;
People ex rel. Moscowitz vs. Jenkins, 202
 N. Y., 53;

People vs. Ringe, 197 N. Y., 143;
Hauser vs. North British & Merc. Ins. Co., 206 N. Y., 455;
People ex rel. Niger vs. Van Dell, 85 Misc. Rep., 92.

In *Adams vs. Tanner*, 244 U. S., 590, an act which forbade employment agents from receiving fees from workers for whom they found places, was held to violate the due process clause of the Fourteenth Amendment, because it in effect destroyed their occupation as agents for workers, the business of securing such work for the unemployed in return for an agreed consideration being regarded as a useful and legitimate business. In the course of his opinion Mr. Justice McReynolds said:

“Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one’s right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked. The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote a few.

In *Allgeyer vs. Louisiana*, 165 U. S., 578, 589, we held invalid a statute of Louisiana which undertook to prevent a citizen from contracting outside the State for insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The following quotations from other decisions are pertinent:

"The right to buy, sell, barter and exchange property is a necessary incident to its ownership, and, subject to reasonable regulations, is as much protected by this provision of the Constitution as is the ownership itself."

City of Carrollton vs. Bazzette, 159 Ill., 283; cited with approval in

People ex rel. Moskowitz vs. Jenkins, 202 N. Y., 53.

"Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest, and the fact that some persons engaged in the same business are dishonest does not justify legislation

prohibiting either directly or indirectly the business."

People ex rel. Moskowitz vs. Jenkins, supra;

People ex rel. Tyroler vs. Warden, 157 N. Y., 116.

"Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limitation of the fundamental law."

Collister vs. Hayman, 183 N. Y., 250.

In *Fisher Co. vs. Woods*, 187 N. Y. 90, a section of the Penal Code which provided that in cities of a certain class persons offering for sale real property without the written authority of the owner were guilty of a misdemeanor, was declared unconstitutional. In the course of his opinion Judge Haight said:

"The business of a real estate agent or broker or of any person who engages his services to an owner of real estate to hunt up or procure a purchaser, through advertisements or otherwise, is perfectly lawful and legitimate, and persons engaged in that business are entitled to as full a protection of their rights under the Constitution as that of any other person engaged in any of the other professions, trades or occupations. It may be that there are dishonest persons engaged in the business of real estate agents, but it is equally true that dishonest persons are found in every occupation."

In *Producers Transportation Co. vs. Railroad Commissioners*, 251 U. S., 230 which related to the

operation of a pipe-line for the transportation of oil, Mr. Justice Van Devanter said:

“It is of course true that if the pipe line was constructed to carry oil for particular producers under strictly private contacts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat or by any regulating commission, convert it into a public utility or make its owner a common carrier, for that would be taking private property for public use without just compensation which no State can do consistently with the due process clause of the Fourteenth Amendment.”

In *Michigan Public Utilities Commission vs. Duke*, 45 Sup. Ct. Rep. 191, decided January 12, 1925, it was held that an act making persons engaged in transportation of persons or property by motor vehicle on public highways, common carriers violated the due process clause as applied to a private carrier engaged exclusively in transporting property for certain concerns, under contracts with them. Mr. Justice Butler said:

“Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment. Producers Transportation Company *vs.* Railroad Commission, 251 U. S. 228, 230, Wolff Co. *vs.* Industrial Commission, 262 U. S. 522, 535.”

Decisions Relating to Prices of Theatre Tickets.

It is unnecessary, however, to discuss at length the philosophy of legislation of this character, since carefully adjudicated cases have denied the existence of the power of the legislature to fix the price of theatre tickets.

- People vs. Newman*, 109 Misc., 622;
Ex parte Quarg, 149 Cal., 79, 5 L. R. A.,
 N. S., 183;
People vs. Steele, 231 Ill., 340, 14 L. R. A.,
 N. S., 361;
City of Chicago vs. Powers, 231 Ill., 531,
 83 N. E. Rep., 240;
People vs. Weiner, 271 Ill., 74; L. R. A.,
 1916, C. 775;
Chicago vs. Netcher, 183 Ill., 104; 48 L.
 R. A., 261.

In *People vs. Newman* (*supra*), the reasoning of which, as has been shown, was approved and referred to by Governor Miller in 1921 as being "*so cogent as to permit no other conclusion*," Justice Rosalsky declared unconstitutional Section 11-a, Article I, Chapter 3 of the Code of Ordinances of the City of New York, which prohibited the re-sale of theatre tickets at a price greater than fifty cents in excess of the sum printed thereon and which permitted the revocation of a license to sell tickets in the event of a re-sale in excess of that sum. The comprehensive opinion evinces so exhaustive and painstaking a study of the subject that it is earnestly commended for consideration. It is believed that it will be found helpful.

In *Ex parte Quarg, supra*, Mr. Justice Shaw said:

"It is perhaps, not important in this case to consider and define the precise nature of a theatre ticket. It may be either a mere license, revocable at the will of the proprietor of the theatre, or it may be evidence of a contract whereby, for a valuable consideration, the purchaser has acquired the right to enter the theatre and observe the performance, on condition that he behaves properly. These are matters which concern only the proprietor and the purchaser. No third person can question the right of the purchaser. However, by the act of 1893 (Stat. 1893, Chap. 185, page 220), a ticket of admission to a public place of amusement, when sold, is made, at least, an irrevocable license to the purchaser of the ticket to occupy a place therein during the performance. *Greenberg vs. Western Turf Assn.*, 140 Cal., 360, 73 Pac., 1050. Such a ticket, therefore, represents a right, positive, or conditional, as the case may be, according to the terms of the original contract of sale. This right is clearly a right of property. The ticket which represents that right is also, necessarily, a species of property. As such, the owner thereof, in the absence of any condition to the contrary in the contract by which he obtained it, has the clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain. The statute in question forbids any sale for a price higher than that at which it was sold by the proprietor of the theatre; and to that extent it infringes upon the right of property guaranteed by the Constitution and existing in the individual. It is therefore a void enactment, unless it can be upheld as an exercise of the police power.

"The police power is broad in its scope, but it is subject to the just limitation that it extends only to such measures as are reasonable in their application, and which tend in some

appreciable degree to promote, protect, or preserve the public health, morals or safety, or the general welfare. The prohibition of an act which the Court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation; and it is therefore not a legitimate exercise of police power. The sale of a theatre ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit. It does not injure the proprietor of the theatre; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto; and, having neglected that opportunity, or being unwilling to undergo the necessary inconvenience, and willing to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just as fair as he is concerned."

In *People vs. Steele, supra*, Mr. Justice Dunn said:

"The statute prohibits the sale of a theatre ticket at a price above the printed rate, and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theatre tickets at an advance over the price at the box office. Such sale is not injurious to the public welfare, and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theatre. The buyer purchases voluntarily. He is under no

compulsion. If the conducting of a theatre is a mere private business, there is no reason why the proprietor may not sell the tickets when and where, at what prices, and on what terms, he chooses. It is insisted, however, that the operation of a theatre is a business affected with a public interest, and therefore is subject to control by the legislature. It is a well-established doctrine that, where the owner of property has devoted it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, so long as such use is maintained.

* * * The fact that a license is required does not make the business a public employment. The cases where a business has been regarded as affected with a public interest have been cases where the person or corporation engaged in the business was acting under a franchise, or cases affecting trade and commerce, where either there has been a virtual monopoly of means of transportation or methods of commerce; or, where, from the nature of the business, in its regular course, the person carrying it on was necessarily entrusted with the property or money of his customers; * * *

“The act prohibits the sale of a ticket by the manager of a theatre without the requirement on its face that it shall not be resold at an advance. It prohibits the sale of a ticket at an advance, and it prohibits the keeping of a place for such sale. If the manager finds it profitable to have tickets on sale at different places, he may not sell at the regular price to brokers who maintain offices at such places and get their expenses and profits out of the advance in price on their resale of the tickets. The broker's business is prohibited, because it has been made unlawful to make a profit. The public is no better nor worse off in health,

morals, security, or welfare. These are arbitrary and unreasonable interferences with the rights of the individuals concerned. The business of the broker in theatre tickets is no more immoral or injurious to the public welfare than that of the broker in grain or provisions. If he does not make the price satisfactory to intending purchasers, they are under no compulsion to buy. They have no right to buy at any price except that fixed by the holder of the ticket. The manager may fix the price arbitrarily, and may raise or lower it at his will. Having advertised a performance, he is not bound to give it, and having advertised a price, he is not bound to sell tickets at that price. It is immaterial to determine whether a theatre ticket is either transferable or revocable. The fact is that the bearer of the tickets is admitted to the performance. The business of dealing in theatre tickets is carried on to some extent, at least, and the right to do so and to contract in regard to such rights is a right in which those who use it are entitled to be protected."

II.

The business of conducting a theatre and consequently of selling or procuring tickets of admission is not affected by a public interest, in the sense that the Legislature may fix the price at which such tickets may be sold by brokers or limit the compensation chargeable by brokers for procuring them.

This general subject was luminously treated by Mr. Chief Justice Taft, speaking for a unanimous Court in *Charles Wolff Packing Co. vs. Court of*

Industrial Relations, 262 U. S., 522. That case involved the validity of a statute creating a court invested with the power to summon the parties and hear any dispute over wages or other terms of employment in any of the designated industries, and which provided that if it should find the business and health of the public imperiled by such controversy, to make findings and fix the wages and other terms for the future conduct of the industry. In that case the Packing Company was engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. A controversy arose respecting the wages which it was paying to its employees. The Court made findings, including one that an emergency existed, and an order as to wages was made increasing them over the figures to which the company had shortly before reduced them. The statute declared various industries, among others, 1, the manufacture and preparation of food for human consumption; 2, the manufacture of clothing for human wear, and 3, the production of any substance in common use for fuel, each of them infinitely more vital than the purveying of amusement, "to be affected with a public interest." It was nevertheless held, that the act was unconstitutional because it deprived both employer and employee of liberty without due process of law.

The case is especially important because of the commentary to be found in the opinion of Chief Justice Taft, on the formula that a business is "affected by a public interest." He first classifies, page 535, the businesses as to which it has been said that they are clothed with a public interest justifying some public regulation, as follows: (1) those carried on under the authority of a pub-

lie grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any part of the public, such as railroads, other common carriers and public utilities; (2) certain occupations, regarded as exceptional, as, for example, the keepers of inns, cabs and grist mills, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial Legislatures for regulating all trades and callings; and (3) businesses which though not public at their inception may be fairly said to have risen to be such and to have become subject in consequence to some governmental regulation. The opinion then continues (pages 536, 537, 538, 539, 540, 543, 544):

“It is manifest from an examination of the cases cited under the third head *that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.* The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

“In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, *but the expression ‘clothed with a public interest,’ as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered.* The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn vs. Illinois* and

the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

* * *

*"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances. * * **

*"In nearly all the business included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation. * * **

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over

its entire management and run it at the expense of the owner. * * *

"If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley in characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U. S., 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

"This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. * * * The employer is bound by this act to pay the wages fixed *and while the worker is not required to work, at the wages fixed*, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him. * * *

"The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for the regulation of the business of the plaintiff in error whose classification as public is at the best doubtful. It is not too much to say that the ruling in *Wilson vs. New*, went to the border line although it concerned an interstate common carrier in the presence of a nationwide emergency and the possibility of great disaster. Certainly there is nothing to justify

extending the drastic regulation sustained in that exceptional case to the one before us.

"We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

This decision was followed in *Dorchy vs. Kansas*, 264 U. S. 286, 289, where the business involved and declared to be affected with a public interest, was the mining of coal.

Authorities Relied Upon by the State.

Our opponents driven to the proposition that the business conducted by ticket-brokers is affected by a public interest, rely upon a line of decisions some of which are considered in the opinion just cited and none of which have anything in common with the present case.

They all relate to a business which involved an admittedly public interest, as, for example, the business of a common carrier, an inn-keeper, or a similar or equivalent occupation, especially that of a public service corporation or one whose right to carry on business depends entirely upon legislative authority.

Such was *Munn vs. Illinois*, 94 U. S., 113. It related to the regulation of elevators for the storage of grain, a business having, for all practical purposes, the characteristics of that of a common carrier, and therefore, affected with a public interest. As was said by Mr. Justice Waite:

"Property does become clothed with a public interest when used in a manner to make

it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use."

It was there shown that the business of the warehousemen, who were carrying on their operations in Chicago and to whom this statute related, was so conducted that every bushel of grain that came into the city paid a toll for its passage, which was a common charge. The elevators stood in the very gateway of commerce and took toll from all who passed. The entire public therefore had a direct and positive interest in the business which in every aspect of it was indispensable to the public welfare.

In the present case there is no such element as that considered in the grain elevator case just referred to. Ticket brokers are engaged in a private business. Nobody is called upon to deal with them who does not desire to do so. They may refuse to serve the public generally. They may at will suspend their business. They have no interest in the theatres to which the tickets confer admission. They lawfully acquire the tickets which they sell to or which they procure for their customers. Their business is no more public than that of any other kind of broker or agent or of any merchant.

German Alliance Ins. Co. vs. Kansas, 233 U. S., 389, is similar to *Munn vs. Illinois*. There, the business sought to be regulated was that of fire insurance. That was shown to be a business that had been regulated for many years in all parts of the country. In fact it cannot be carried on at all, without legislative authority. It was conceded to be one affecting the public welfare. Insurance was

looked upon as being an assimilation to a tax. A large part of the country's wealth subject to uncertainty of loss through fire was recognized as being protected by insurance. This was regarded as a demonstration of the interest of the public in the business. Mr. Justice McKenna, after referring to these features of the business, said:

“To the contention that the business is private, we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositaries of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced. • • • The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples *we have tried to confine our decision to the regulation of the business of*

insurance, it having become 'clothed with a public interest, and therefore subject to be controlled by the public for the common good.'”

Attention is also called to the dissenting opinion of Mr. Justice Lamar, in which the Chief Justice and Mr. Justice Van Devanter concurred, as indicating the limitations on the power to fix prices, which were recognized, although deemed inapplicable by the majority of the Court to the subject of insurance for the reasons above quoted.

It has been argued that this case is similar to *Blach vs. Hirsh*, 256 U. S., 135, 154; *Marcus Brown Holding Co. vs. Feldman*, 256 U. S., 170; *Edgar A. Levy Leasing Co. vs. Siegel*, 258 U. S., 242, and *People ex rel. Durham Realty Co. vs. LaFetra*, 230 N. Y., 429. These cases proceed upon an entirely different principle, namely, that an emergency existed which made it necessary for the state to interfere temporarily, and not permanently, in the interest of public health. It was contended that there was a dearth of housing facilities, which, in the absence of legislative protection to those in the occupation of dwellings, would subject thousands of families to exposure in inclement weather, deprive them of a roof over their heads, and thus endanger the health and lives of a considerable part of the community. This legislation was considered exceptional, and great care was taken to make it clear that it should not be regarded as a precedent in normal times.

This is shown by the opinion of Mr. Justice Holmes in *Pennsylvania Coal Co. vs. Mahon*, 260 U. S., 293, 416, where the same voice that spoke for the majority in the Rent Cases, just referred to,

rendering a judgment from which there was but one dissent, declared:

“The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a *temporary emergency* and providing for compensation determined to be reasonable by an impartial board. *They went to the verge of the law*, but fell far short of the present act.”

See also

Adkins vs. Children's Hospital (supra).

In *Terminal Taxicab Co. vs. District of Columbia*, 241 U. S., 252, 256, the case likewise involved the regulation of a taxicab business which provided service at railroad stations and hotels. It was held that, in so far as the business which was sought to be regulated by the Public Utilities Commission of the District of Columbia related to the public use of the plaintiff's taxicabs, the regulation thereof was lawful; but as to that portion of its business which consisted mainly in furnishing automobiles from its central garage on orders by telephone, it was held that the regulation was not authorized. Mr. Justice Holmes thus expressed the views of the Court:

“Although I have not been able to free my mind from doubt, the Court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the

public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co. vs. Kansas*, 233 U. S., 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary, it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

In *Yellow Taxicab Co. vs. Gaynor*, 82 Misc. Rep., 94, affd., 159 App. Div., 893, 212 N. Y., 97, the ordinance involved related to the regulation of taxicabs. The Charter gave express power to the Board of Aldermen to provide for the licensing and otherwise regulating the business of hackmen and cabmen, including the regulation of the rates of fares. The business was unquestionably that of a common carrier, and consequently was subject to the same power of regulation as that of a railroad or a ferry, and has been so regarded from time immemorial.

Schmidinger vs. Chicago, 226 U. S., 578, merely involved the question as to whether an ordinance, enacted under express legislative authority, fixing standard size of bread loaves, was valid. That was regarded merely as an exercise of the police power intended to prevent deceit, and practically of the same character as that of fixing weights and measures. It did not undertake to go beyond that point.

This decision was modified in *Burns Baking Co. vs. Bryan*, 264 U. S., 505.

Rast vs. Van Deman & Lewis, 240 U. S., 342, which related to a special tax on trading stamps, proceeded on the theory set forth by Mr. Justice McKenna at page 365 and which has no application here:

“The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a ‘lottery,’ may not be called ‘gaming’; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry and of judgment that it is finally within the power of the Legislature to make.”

In *People ex rel. Armstrong vs. Warden*, 183 N. Y., 226, the validity of certain provisions of the employment agency act was considered. It was held that in order to prevent frauds and to suppress immorality it was lawful for the legislature to regulate the keeping of employment agencies. The license fee imposed by the statute was the sum of \$25 annually in cities of the first and second class, to which alone the act related. The legislation clearly came within the police power of the State. Judge O'Brien said:

“The Legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting

it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality."

The limitation of the power of the Legislature to regulate the compensation of employment agencies was as has been shown, fully considered in *Adams vs. Tanner*, (*supra*).

That even a theatre, and *a fortiori*, those who are engaged in the business of selling tickets entirely outside of the theatre, do not come within the purview of the doctrine on which the State relies, is apparent from the decisions in *Collister vs. Hayman*, 183 N. Y., 250; *People ex rel. Burnham vs. Flynn*, 189 N. Y., 160; *Aaron vs. Ward*, 203 N. Y., 355, and *Woolcott vs. Shubert*, 217 N. Y., 212.

In *Collister vs. Hayman* (*supra*), the question arose as to whether the owner of a theatre on issuing tickets could condition their validity by providing that if sold by the purchaser on the sidewalk they would be refused at the door. It was contended that this condition was opposed to public policy and that the theatre owner had no right to make it a part of his contract with purchasers. This contention was rejected. In the course of his opinion Judge Vann said:

"The defendants were conducting a *private business* which, even if clothed with a public interest, *was without a franchise to accommodate the public, and they had the right to control it the same as the proprietors of any other business*, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the State and

hence under obligation to transport any one who applies and to continue the business year in and year out, the proprietors of a theatre can open and close their place at will and no one can make lawful complaint. *They can charge what they choose for admission to their theatre. They can limit the number admitted. Then can refuse to sell tickets and collect the price of admission at the door. They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted; or that a woman cannot enter unless she is accompanied by a male escort, and the like. The proprietors in the control of their business may regulate the terms of admission in any reasonable way. If these terms are not satisfactory no one is obliged to buy a ticket or make the contract."*

Further on in the opinion, Judge Vann says:

"This is not a case involving the liberty of the plaintiff to sell his property, for he could sell it to any person and in any place, except in the one prohibited by the contract which constituted the property. The contract did not interfere with his absolute freedom of action except to this limited extent duly agreed upon in advance, while he attempts to interfere with freedom of contract on the part of the defendants by restraining them from enforcing an agreement which they had made and to which he had assented. Restraint by statute and restraint by contract are quite different. What the parties to a contract agree upon is valid almost without limitation, but what the Legislature may prohibit parties from agreeing upon is subject to the limita-

tions of the fundamental law. * * * This case involves not a statute but a contract, which excludes no one from carrying on the business of selling theatre tickets, but simply prevents a sale thereof on the sidewalk in violation of the express stipulation of the tickets themselves."

People vs. King, 110 N. Y., 418, also relied upon by the state, was cited and distinguished, the Court saying:

"This has no bearing upon the resale of tickets in violation of a contract made with the original purchaser. It was especially designed to prevent the exclusion from 'places of public accommodation or amusement,' of anyone on account of race, creed or color, and apparently was also intended to prevent any discrimination founded on rank, grade, class or occupation. The contract and tickets in question did not discriminate against any person on account of any reason named in the statute, for the same condition is imposed upon all and all are treated alike."

In *Burnham vs. Flynn*, *supra*, the relator, a theatrical manager, was committed on a warrant charging him with conspiracy to exclude from the theatres of New York City one Metcalf, a dramatic critic, because of malicious, scurrilous and unjustifiable attacks upon the Jewish patrons of the theatres, which tended to injure the business of the theatres. In the course of the opinion, which held that no crime had been committed, Judge Edward T. Bartlett said:

"The remaining question in the case is whether the proprietor of a theatre has a right to decide who shall be admitted to witness the plays he sees fit to produce in the absence of

any express statute controlling his action. At this late day the question cannot be considered as open in this State. There are a number of cases arising out of the purchase of theatre tickets from speculators on the sidewalk after notification by the proprietor that the same will not be honored at the door. * * * These cases illustrate the absolute control that the proprietor of a theatre exercises over the house and the audience. *He derives from the State no authority to carry on his business, and may conduct the same precisely as any other private citizen may transact his own affairs.*"

See also

Burton vs. Scherof, 63 Mass., 133;
Commercial Telegram Co. vs. Smith, 47
 Hun, 494.

To the same effect is the language of Chief Judge Cullen in *Aaron vs. Ward*, *supra*.

There the plaintiff purchased a ticket and took her position in a line of defendants' patrons leading to a window at which the ticket entitled her to receive upon its surrender a key admitting her to its bath-house. When she approached the window a dispute arose between her and the defendants' employees as to the right of another person not in the line to have a key given to him in advance of the plaintiff. As a result of this dispute the plaintiff was ejected from the defendants' premises, the agents of the latter having refused to furnish her with the accommodations for which she had contracted. It was held that, regardless of whether or not the defendants were originally bound to admit the plaintiff to the bath-house, she was nevertheless entitled to re-

cover for the indignity inflicted upon her by the acts of the defendants' servants. All that the Court said regarding theatres was that the business is not "strictly" private.

In *Woolcott vs. Shubert, supra*, the plaintiff was a dramatic critic who was arbitrarily excluded by the defendant from his theatre and sought an injunction to restrain the continuance of such exclusion. Holding that the action would not lie, Judge Collin said:

"The acts of the defendant were within their rights at the common law. At the common law a theatre, while affected by a public interest which justified licensing under the police power or for the purpose of revenue, *is in no sense public property or a public enterprise, it is not governed by the rules which relate to common carriers or other public utilities.* The proprietor does not derive from the State the franchise to initiate and conduct it. *His right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded.* His rights at the common law, in the respect of controlling the property, entertainments and audience, have been too recently determined by us to be now questionable."

The business of conducting a theatre being thus shown to be essentially a private business, is not affected with a public interest in the sense that it is within the legislative power to fix the price of tickets of admission whether sold by the owner of the theatre or by one acquiring ownership from the proprietor of the theater of the ticket or by one who renders the service of procuring the ticket for one desiring to visit the theatre. The mere fact that the Legislature has seen fit so to

say that it is, "affected with a public interest," does not alter the fact. It would be recognized at once as a legal absurdity for the Legislature to declare the business of a tailor, of a shoemaker, or of any other craftsman, or of any mechanic, industrial or agricultural workman to be affected with a public interest. In like manner, to declare that a dry goods merchant or a clothing merchant or a grocer is engaged in such a business would be considered startling, when one considers the consequences which this statute seeks to deduce from such a declaration. That is precisely what was ineffectually attempted to be done in *Charles Wolff Packing Co. vs. Court of Industrial Relations* (*supra*), approved in *Chastleton Corporation vs. Sinclair*, 264 U. S., 547.

Legislatures are not omnipotent. They cannot by their pronouncement change the inherent nature of things—make white—black; or night—day; or bitter—sweet. They can no more alter facts than that a man can increase his height by taking thought.

The relations between the public and these craftsmen, mechanics or merchants are of a more vital nature than those of the purchaser of a theatre ticket with the theatre owner, or with one dealing in theatre tickets or rendering service in connection with the procuring of such tickets for those desiring to attend a performance. Should it be suggested that one rendering service in connection with the purchase of a necessary of life is engaged in a business clothed with a public interest, it would at once be answered that all the legislative declarations in the world could not, under our constitutional system, permit the law-making body on the basis of such a declaration, to

undertake to fix the compensation for the service rendered or to determine the price for which the article in relation to which the service is rendered, is to be sold. If it could be done with respect to a theatre ticket, it could with equal right apply to the purchase or sale of real or personal property of any kind whatsoever, and an era of paternalism would follow compared with which the legislation of the days of Edward III, and of Elizabeth, would be innocuous.

It must necessarily follow that if the owner of a theatre has the absolute control of it and may sell tickets of admission to it to any person and on any terms that he may see fit, one who sells tickets which he has lawfully acquired from the owner of a theatre, or one who procures tickets from the theatre owner or from those to whom the latter has sold tickets, for a customer who pays for the service rendered, has the equal right to sell or procure tickets for anybody whom he may desire and on any terms that may be agreed upon between him and his patron.

The contention that the price of theatre tickets has been increased in recent years and that to some extent such increase is attributable to the ticket broker, is not only inaccurate but is entirely beside the question. The owner of the theatre may close his doors whenever he desires to do so. There is nothing to prevent him from charging whatever he is disposed to charge and he has always availed himself of that right. If his play proves popular he increases his admission charge. If he secures great artists, that fact is reflected in the price of tickets. It is well known that on holidays and on Saturday nights practically every theatre in New York advances the prices of its tickets of admis-

sion, sometimes doubling the price. The increased expense of maintaining a theatre, the tax imposed by the Federal Government on theatre tickets, and even on the amounts realized by ticket brokers on the sale of tickets or for services rendered to their customers in procuring them, as well as the universal law of supply and demand, have determined the enhanced price of tickets. The same factors have affected the prices of practically every commodity, not merely of luxuries, but of the necessities of life.

III.

The opinions of Judge Lehman and Mr. Justice Martin.

(1) In the opinions rendered in both of the courts below, *People ex rel. Cort Theatre Co. v. Thompson*, 283 Ill. 87, 119 N. E. Rep. 41, is cited. On examination that case will be found to reaffirm the doctrine of *People v. Steele, City of Chicago v. Powers* and *Ex parte Quarg, supra*, which were distinguished from the facts there under consideration.

It involved the validity of an ordinance which applied solely to the owners of theatres. They were required to procure licenses. The ordinance also provided that every ticket of admission to a theatre shall have printed upon its face the price thereof, and that no licensee, namely, the owner of a theatre, and no officer, manager or employee of any licensee, shall directly or indirectly receive any consideration, of any nature whatsoever, upon the sale of any such ticket beyond or in ex-

cess of the price designated thereon, or directly or indirectly enter into any arrangement or agreement for the receipt of such consideration.

The Theatre Company was refused a license to conduct a theatre because it had failed to comply with this ordinance. In the defendant's answer to the petition for a writ of peremptory mandamus, it was alleged, and on demurrer by the relator was admitted, that various proprietors of theatres, including the relator, issued tickets of admission to the performances given in their places of amusement on which were printed the prices of the tickets, which were also advertised in the public press, but in truth and in fact the relator and such other proprietors had arrangements and agreements with various ticket brokers and scalpers by which a large number of such tickets were placed in the hands of such brokers and scalpers and sold for prices in advance of the price printed thereon, and the excess above such price printed on the tickets was divided between the brokers and the proprietors, the tickets being sold at higher prices for the joint benefit of the brokers and the proprietors.

In the opinion rendered, Mr. Justice Cartwright said:

“The question to be determined is whether, in granting a license to conduct a place of public amusement subject to regulation and the police power, a provision that the licensee shall not enter into an arrangement with ticket brokers or scalpers under which the licensee and the ticket brokers or scalpers both represent that the ticket brokers or scalpers are independent dealers and owners of tickets, when in reality they are not owners, but confederates, and the ticket brokers or scalpers sell the tickets at higher prices for

the joint benefit of the licensee and themselves, and by means of falsehood and misrepresentation that all tickets to a performance have been sold a portion of the public are required to pay higher prices for the same accommodations than others, is an invasion of rights guaranteed by the State and Federal Constitutions."

In the course of the discussion it is stated:

"No ticket broker or scalper is concerned with this suit, and none is represented by the appellee, and if the ordinance merely prohibits the innocent business of ticket brokers the appellee will not be harmed. The argument, however, concerning the right of ticket brokers to buy and sell tickets and the right of the appellee to sell to them is an effort to raise a false issue in no manner involved in the question whether the court erred in sustaining the demurrer to the answer. The answer alleged that the license was refused because appellee would not agree to obey the requirement of the ordinance for impartial treatment of ticket buyers and to stop the practices set forth in the answer. There is nothing in the answer about purchasers of tickets, whether brokers or not, or their right to resell tickets at a profit. The manifest object of the ordinance is to compel impartial treatment of all buyers of tickets by the licensee. It is so interpreted by counsel for the appellants. The corporation counsel in his brief and argument says: 'The purchaser of such tickets, so far as this ordinance is concerned, may resell them at an advanced price or do anything else with them which he may desire to do.' Considering the whole ordinance with its evident purpose, it does not prohibit sales to brokers or any other class of persons, but is designed to prevent theatre owners from entering into such arrangements as are stated in the ordinance."

Referring to this decision Judge Lehman, in the present case (237 N. Y. 325) says:

"Whether the public character of the places of amusement pointed out in this decision is in itself sufficient to give the Legislature power to control the prices which may be charged by the proprietor of places of public amusement has not even been considered by us, for the present statute does not attempt to fix the price which may be charged by the proprietor, but merely requires him to 'print on the face of each such ticket or other evidence of the right of entry the price charged therefor' by him. No theatre proprietor is now challenging that provision, so we are not called upon to express any opinion concerning its validity, though a similar provision in an ordinance of the City of Chicago was sustained in the case of *People v. Thompson*, *supra*." (*Rec.*, p. 49, fol. 85.)

We have already shown the purpose which led to this requirement in the Chicago ordinance. It was in no sense intended to limit the price which the broker who actually owned the theatre ticket could charge for it.

The Court likewise refrained from deciding that a person who assumed to furnish tickets of admission to the public had subjected himself to the control of the Legislature in regard to the price which he might demand for the ticket. At least that is what we understand by the remarks made in the sentence beginning at the bottom of page 325. (*Rec.*, p. 49, fol. 82.)

(2) Apparently the opinion of the Court of Appeals revolves around the succeeding sentence, where Judge Lehman says:

"The Legislature has, however, pointed out that the statute is enacted 'for the pur-

pose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses,' and we may profitably consider in the first place whether 'extortion,' or exorbitant prices exacted by oppression, instead of fixed by free agreement, is not the real abuse which the Legislature is seeking to remedy, and, if so, whether the Legislature has the power to remedy the abuse of 'extortion' by price regulation."

It may be useful to call attention, by way of parenthesis, to the similarity between the denunciatory terms "*fraud, extortion, exorbitant rates and similar abuses,*" as quoted from the act under review, and the terms "*covetise, malice, co-action and extortion,*" used in the Statutes of Laborers, *supra*. In both these terms are made the pretext for price fixing.

The learned Judge concedes that the word "extortion" is not used in the sense in which it is employed in the New York Penal Law (Section 850). It is suggested that the Legislature intended by that word to refer to "the exaction of money made possible because of oppressive conditions or circumstances, as distinguished from the receipt of money as a result of free negotiations and willingly paid for a service or commodity." (*Rec.*, p. 50, fol. 86.)

It is significant, however, that, regardless of the pronouncement contained in Section 172 of the act, which relates to the restriction of price, there is not a word in the enactment itself which deals with or defines extortion, fraud or exorbitant rates. They are mere epithets and therefore futile (*Fogg v. Blair*, 139 U. S. 127; *Kent v. Lake Superior Canal Co.*, 144 U. S. 91; *United States v. Cohen Grocery Co.*, 255 U. S. 89 to 91). It

merely prohibits a ticket broker from reselling a ticket "at a price in excess of fifty cents in advance of the price printed on the face of the ticket." So far as the statute is concerned, the resale of a ticket at such advance may be the result of free negotiations and may have been willingly paid for the ticket or for the service rendered by the broker in procuring the ticket for the purchaser. Indeed, even if the latter requested the broker to act for his accommodation in order to secure a seat specially suitable to his needs, so that there could be no possible question of the exaction of money by oppressive conditions, the statute none the less makes the act of the broker in selling the ticket at an advance of more than fifty cents above the printed price, a misdemeanor.

The Court of Appeals recognized the difficulty of its position, for as is shown by the following excerpt from an address recently delivered by Chief Judge Hiscock of the New York Court of Appeals, before the Association of the Bar of the City of New York (New York Law Journal, September 6, 1924):

"The most recent decision of the Court upholding police regulation was the one giving the stamp of approval to the statute regulating the business of brokers engaged in selling theatre tickets and for which there was great demand in New York City. That decision is liable to be misunderstood unless considered with some care. It did not uphold the statute in question as a statute fixing the price of theatre tickets, but on the ground that the sale of tickets by brokers intimately connected with theatres, which have long been held to be subject to regulation, was so controlled and conducted that it was liable to be productive of fraud and extortion in the pur-

chase of tickets, and that therefore it might be properly regulated."

When analyzed, the opinion, in fact, upheld the statute as a price-fixing law, because, stripped of all verbiage, it is that and nothing else.

(3) At page 328, (*Rec.*, p. 51, fol. 87) Judge Lehman instances the ancient statutes against "engrossing" and "forestalling" as being "essentially examples of such legislative mandates" as the law now in question is claimed to be.

The statute is, however, significantly devoid of any such suggestion. There is no reference to engrossing or forestalling, in words or effect, directly or indirectly. However innocent of such a purpose the broker may be, however useful his service to the purchaser of the ticket, and however desirous the latter may be of paying the price at which the ticket was resold, nevertheless, if the broker receives more than fifty cents above the printed price, he is guilty of a misdemeanor, and if he has procured a license, it becomes at once revocable and he becomes liable upon his bond. In this aspect the statute under review not only differs from the "ancient statutes," but is totally different from the ordinance considered in *People ex rel. Cort Theatre Co. v. Thompson*, *supra*.

A mere outcry against fraud, extortion and exorbitant rates does not justify this legislation, since its prohibition or the offence which it creates is not predicated on proof of fraud or extortion or the charge of an exorbitant rate. Given a sale "at a price in excess of fifty cents in advance of the price printed on the face of the ticket," a misdemeanor has been committed, however free from fraud or extortion or exorbitancy the transaction may have been.

(4) The opinion of Judge Lehman further comments on the testimony that those engaged in the business of reselling tickets *are compelled by theatre managers*, even before the first performance of a new play, to buy and pay for seats eight weeks in advance.

The statute does not forbid the purchase by ticket brokers from the theatre managers of tickets in advance of the staging of a play. The usefulness of a broker to the public depends on his ability to serve and to secure seats for those who otherwise would be unable to procure them, e. g. accommodations suited to a playgoer who is deaf or of impaired sight which he might not be able to secure, or which if a stranger he could not obtain. It is therefore necessary to acquire in advance tickets to satisfy these various demands.

The business of a broker being recognized as lawful, there is nothing in the statute which renders such an acquisition of tickets a violation of law. *The compulsion exercised by theatre managers is not sought to be punished.* In that respect this case differs fundamentally from *People ex rel. Cort Theatre Co. v. Thompson*. Here there is no element of conspiracy between the brokers and the theatre owners, such as there was in the case cited. Nor are the pains and penalties of this act directed against the theatre managers who have exercised this compulsion. The only obligation which the statute imposes on them is that of printing on the face of each ticket the price charged for admission to the theatre, and the only violation for which the theatre manager may be punished is his failure to print "the price charged for the ticket" by him. The statute does not even prohibit the theatre man-

ager from actually receiving for the ticket sold by him a price in excess of fifty cents above that printed on the face of the ticket. In fact Judge Lehman, referring to this statute on page 330, says:

“It does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and consumer to the free play of the laws of supply and demand. It does not even prohibit brokers from obtaining control of the supply of choice seats in advance of public sale. It merely prohibits brokers from charging more than a fixed and presumably reasonable profit whether they acquire such control or not and thereby it reasonably tends to end the extortion which, the Legislature could properly find, exists and constitutes an abuse which is so general and of such importance as to call for legislative remedy” (*Rec.*, 52, fol. 88).

The last sentence quoted, it is submitted, is a *non sequitur* to the two previous sentences. In spite of what has been said in other parts of the opinion, it indicates that the statute is a price-fixing statute so far as it relates to the service rendered by the broker. It is not based on the theory that the brokers have acted unlawfully or fraudulently. *Mutatis mutandis* the same reasoning might be indulged if, instead of relating to theatre tickets, the broker whose charges were to be regulated had been concerned in selling a food product, textiles, live-stock, land, pictures, or any other property. The interpolation of the word “extortion” by way of characterization, cannot make that illegal which otherwise would be entirely lawful.

(5) Equally erroneous is the statement (*pp.* 330, 331):

“But, even if we were to assume that the interest of the public in such business is not in itself sufficient to justify regulation of price, yet a statute which reasonably limits the amount which brokers may charge upon the resale of a ticket in order to end the abuse of extortion of large additional amounts by reason of the control of the supply should not be condemned merely because the Legislature has seen fit to use price regulation as the instrument which may accomplish the desired purpose” (*Rec.*, p. 52, *fol.* 89).

The same process of reasoning would permit the Legislature to resort to price regulation for the purpose of dealing with any imaginable abuse that might arise in any conceivable business. If the business itself cannot be forbidden merely because of the existence of some abuse, it would seem to follow that if price-fixing, as such, is unconstitutional, it cannot be justified merely because it might drive those engaged in the business out of it.

Adams vs. Tanner, 244 U. S. 594, 595.

People ex rel. Tyroler vs. Warden of City Prison, 157 N. Y. 123, 124.

The frequent repetition of the idea that the brokers have a control of the supply of tickets, is not in conformity with the facts. In Manhattan and Brooklyn there are 108 first class theatres. In Manhattan there are 283 moving picture theatres, in Brooklyn 315, in Queens 71 and in Richmond 9. Moreover, there are many other places of amusement in these localities. To say, therefore, that the brokers have a control of

the supply of tickets, is an unwarranted assumption. The circumstance that, in order to supply themselves with the commodity which the public seeks to secure through them, they are obliged to lay in a stock of tickets for various theatres, by no means constitutes a control of the supply, even though the aggregate number of tickets that may at certain times be in the possession of all of the brokers combined may be substantial. The various brokers are however, in sharp competition with one another. Unless they can sell their tickets they would be ruined financially, because of the very considerable expense involved in carrying on their business.

The same argument could be made with regard to dealers in furs, silk fabrics, or any other article of trade in which the supply may be limited and is at times held by a restricted number of brokers or dealers. The fact that they regulate their prices in accordance with the demands of fashion or the public preference and secure a larger profit because of being able to meet the sometimes inexplicable taste of the public, would certainly not sustain a price-fixing statute. If it did, it would be destructive of trade and commerce and an encroachment upon liberty.

(6) On page 329 Judge Lehman says:

“The Legislature has the power to regulate reasonably acts which lead to abuses, through which the general public is compelled to pay a group of men for services which at least in part are not desired by the public, especially where such acts occur in a business which is measurably affected with a public interest” (*Rec.*, pp. 51, 52, fol. 88).

Here, again, it is important to distinguish between legislation which defines abuses and then

seeks to deal with them, and legislation which imposes a burden upon a legitimate business which is likely to destroy it or drive those who are engaged in it out of the business, by the process of price-fixing. Surely it is not within the legislative power to fix the price at which a theatre manager may sell his tickets, or to secure for the public cheap tickets, or to determine how much the public may voluntarily pay the ticket broker who serves it and who does so because of the public demand for his services. The fact that a part of the public does not desire the services of the broker is not a justification for legislation leading to the abolition of ticket brokerage. The wishes of those who do not desire to avail themselves of that convenience should not prevail over those of others who habitually do. Surely a matter of this kind cannot be determined by a plebescite, and whatever may be the views of A, they should not determine for B whether or not he may secure the services of ticket brokers to supply him with theatre tickets in payment for that service whatever sum he may agree upon with the broker as suitable compensation. If the public did not desire the services of ticket brokers, inexorable economic laws would speedily eliminate the broker. It is because he is found to be useful that he plays a part in the acquisition of theatre tickets by the theatregoing public.

(7) In the course of the opinion of the Appellate Division, Mr. Justice Martin said (*207 App. Div. 342*):

“The evils of theatre ticket speculating are undisputed. The street speculator in particular has become a nuisance. His purpose is to prey on the people by selling his tickets

at an extortionate price" (*Rec.*, p. 33, fol. 59).

If this is intended as a statement that it is not disputed that the business of a ticket broker is an evil, it is certainly an erroneous assumption. We contend that the broker subserves a very useful purpose, beneficial, and not injurious, to the public. The opinion of the Court of Appeals p. 321 so concedes (*Rec.*, p. 46, fol. 82).

The reference to the street speculator is entirely gratuitous. It is not pretended that Weller was a street speculator, or that the act under consideration was aimed at street speculators. They are an entirely different class of persons from those to whom this statute applies. By a previous act (New York Laws of 1921, Ch. 12) specific provision was made, with the concurrence of the brokers against whom this act is aimed, which prohibited the activities of ticket speculators in the streets of a city. It added Section 1534 to the Penal Law, as a part of Article 148, relative to nuisances. It was unquestionably within the power of the Legislature to regulate the use of city streets, especially in so far as it might be attempted to conduct in any such street, in or about the premises of any theatre or concert hall or place of public amusement, the business of selling or offering for sale tickets of admission to a performance therein. Apparently the learned Justice confounded the street speculator with the legitimate dealer in theatre tickets in an orderly manner in a place of business maintained for that purpose.

(8) Mr. Justice Martin says (207 *App. Div.* 342; *Rec.* p. 33, fol. 58):

“Historically considered, theatres may be regarded as ‘affected with a public interest.’ A. E. Haight, in his book ‘The Attic Theatre,’ at page 4, said: ‘To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a government; and they would have though it unwise to abandon to private ventures an institution which possessed the educational value and wide popularity of the drama.’”

It may be safely said that no such idea prevails in this country. Certainly a theatre is not regarded as affected with a public interest in the sense that land may be condemned under the power of eminent domain for the building of a theatre. That would not be regarded as taking property for a public use. In fact it has been held that the taxing power may not be exercised for the establishment and operation of moving picture theatres (*State ex rel. Toledo v. Lynch*, 88 Ohio St. 71; 48, L. R. A., N. S., 720). Nor, judging from many of the plays which now degrade the stage and are offensive to a considerable part of the public, may it be said that they contribute to public education. At all events, the primary purpose of the theatre is to amuse and entertain.

Referring to the passage quoted, it may not be out of place to say that after the Greeks came the Puritans, whose influence upon our constitutional form of government is more immediate and lasting than that of Ancient Rome or of Athens, and that the Pilgrim Fathers, as well as some of the prominent framers of our Constitution, would have been astounded had it been intimated to them that the theatre was “affected with a public interest,” as that phrase is used in the act now under consideration.

(9) With considerable heat, and, we submit, with some inconsistency, Mr. Justice Martin says (207 *App. Div.* 353; *Rec.*, p. 44, fol. 79):

“The statute now under consideration not only permits the resale of tickets, but allows any suitable person who desires to do so to pursue the occupation of reselling tickets. It does not limit or fix the price which the theatre may charge for tickets. It does not interfere with the sale at any price that the theatre sees fit to charge, but it provides that any one who wishes to carry on the business of reselling tickets must do so after he obtains a license, and that, when he does obtain the license, he must sell the ticket at a profit which is fair and reasonable. It strikes at the extortioner only. It prevents fraud and the exaction of an extortionate price from the people who desire to purchase theatre tickets. The act regulates the charges of the speculator or broker. It prohibits those who have a monopoly of the tickets, made possible by the arrangements with the theatres, from charging extortionate fees for ‘service’ in securing and selling tickets.”

The concession that the theatre owner is not prevented from selling the ticket at any price he may fix, without limitation of any kind, is in the same breath coupled with the incongruous idea that the ticket broker is enabled, by arrangement with the theatres, to have an imaginary monopoly of the theatre tickets. The shafts of judicial denunciation are thus aimed at the broker, who is described as an extortioner and whose compensation for service rendered is referred to ironically.

This is nothing but a begging of the question. If the ticket broker is an extortioner or is guilty of fraud, which we deny, then the statute should define and punish acts of fraud and extortion.

This the act under consideration studiously fails to do. The Legislature contents itself with arbitrarily fixing the compensation to which a broker is entitled for actual service, however honestly and honorably rendered, however free from fraud, extortion and exaction, and however welcome and convenient to those who visit the theatre and have not the time to stand in line at its doors and to take their chances of securing the accommodations which they desire and for a time to suit their convenience.

Calling names does not advance the elucidation of a question relating to constitutional rights.

(10) At 207 App. Div. 349 (*Rec. pp. 39, 40, fol. 70*) Mr. Justice Martin, referring to the fact that the ticket brokers were often required by the theatre owners to purchase tickets for weeks ahead, said:

“This combination of theatre owner or manager with speculator or broker by which the attraction is financed or underwritten by the ticket broker or speculator, tends to a monopoly which prevents the public from seeing the performance on any reasonable terms.”

The inference from the fact that the broker makes a quantity purchase of tickets from the theatre owner, that there is a combination between them which tends to a monopoly, is far-fetched and unfounded. The broker buys the tickets in advance because he needs them to supply his customers, and the theatre owner takes advantage of the opportunity to require the broker to make quantity purchases of tickets and is thus enabled to find a market for his commodity which otherwise he might not be able to sell. Far from being

a combination, the theatre owner and the broker are dealing at arm's length. This does not create a monopoly or prevent the public from seeing the performances at the various theatres.

The situation is precisely the same as that which exists when a middleman makes a quantity purchase from a manufacturer or producer, in order to enable him to supply the needs of his customers. In such instances the middleman frequently pays the manufacturer or producer in advance for the merchandise subsequently manufactured and delivered, and facilitates the latter in the financing of his business. That does not constitute a combination or monopoly, even though the fabric or product may be of unique character, and is especially desirable because it bears a popular trademark.

Even if there were no brokers the owner of a theatre producing a popular play might sell out his house, as it is called, for weeks ahead, and, as is conceded, might charge for his tickets of admission any price he desires. From the very nature of things the number of tickets, and especially of front seats for any theatrical performance is limited by the capacity of the theatre and the length of the run, which depends on unknown factors. It might, therefore, be argued with equal justice that if the theatre owner increased the price of his tickets, he would be engaged in carrying on a monopoly "which prevents the public from seeing the performance." If that is a monopoly a revision of that term would become necessary.

IV.

Assuming, that if standing alone that part of the statute requiring the taking out of a license and the giving of a bond could be sustained, the fact that after taking out a license and giving a bond the licensee would be debarred from questioning the validity of the statute and from contesting proceedings for the revocation of the license and the enforcement of the penalty of the bond because of non-compliance with Section 172, the act is unconstitutional in its entirety.

The clause fixing the price at which tickets may be sold by a broker is so interwoven with the license provision that they cannot be separated. Hence, if the "price clause" is unconstitutional, the act as an entirety must fall.

If the license provision of the act could be absolutely separated from the price-fixing clause, a different question from that now before the Court would be presented. In that event, the fact that the Legislature has declared that in case it should be judicially determined that any section of the article is unconstitutional or otherwise invalid, such determination should not affect the validity or effect of the remaining provisions of the article, would doubtless become operative. That declaration merely lays down the well-known rule that has long obtained in constitutional law. It does not, however, control the Court in the exercise of its judicial function to pass on the unconstitutionality of a statute, nor would it justify the Court in declaring any part of this act constitutional, if the taint of unconstitutionality affects every phase of the legislation.

That is the case here. In order to obtain a license, it is necessary for the applicant to give a bond. The bond is to be in the penal sum of \$1,000. *Among the conditions of the bond is one that the obligor will not exact or receive a price for any ticket or evidence of the right of entry to a theatre in excess of the price authorized by the article.* A suit to recover on the bond may be brought by the Comptroller on the relation of any party aggrieved in the event that the obligor has violated "*any of the conditions of the bond,*" and in such case, the recovery is for the full penal sum of the bond, even though the party aggrieved may have paid ten cents only in excess of the price fixed by the statute.

Moreover, if after the license has been issued, the licensee charges for any ticket a price in excess of that authorized in the article, his license may be revoked and if he should thereafter engage in the business of selling theatre tickets he would be guilty of a misdemeanor.

It is thus clear that the yellow thread of unconstitutionality, namely, the illegal price regulation, runs through every part of the fabric of this statute. Hence, one who stands on his constitutional right of entering into a contract without restriction as to the compensation which he charges for his services in procuring or for the selling price of a theatre ticket which he has acquired, is necessarily precluded from applying for a license. If he make such application, he must give a bond, which he at once forfeits upon selling a ticket on conditions other than those specified in the statute, and *eo instanti* subjects the license procured by him to revocation, and upon such revocation further subjects himself to prosecution for a misdemeanor for continuing in a business which he

can only conduct on the condition that he surrenders his right to sell tickets to his customers at a price in excess of that fixed by the statute.

The statute is, therefore, so coercive in its nature as to compel those engaged in this business either to waive a constitutional right against their will, by procuring a license and giving a bond which would preclude them from asserting their constitutional right, or to refrain from taking out a license and from giving the bond and from continuing in the exercise of that constitutional right.

If, therefore, our premise is sound, as we believe it to be, that it is beyond the power of the Legislature to limit the compensation of a ticket broker for the service rendered by him or to fix the price to be charged for tickets sold by him, as proposed in this act, it must necessarily follow that the scheme of this legislation is entirely void.

It is not an answer to say that the Legislature might have passed a licensing act which is constitutional, or that it might require a bond as a condition to the issuance of a license, or that such bond might be conditioned that the obligor will not be guilty of any fraud, or that the license might be revoked in case the licensee shall be guilty of any fraud or misrepresentation. The difficulty lies in the fact that the condition of the bond is not limited to liability upon it in the event of guilt of a fraud by the obligor. Nor is the license to be revoked solely in case the licensee is guilty of fraud or misrepresentation. In each instance, the charge or receipt of a price for a ticket in excess of that authorized by the act forfeits the bond and is cause for a revocation of the license.

This brings us to the discussion of the authorities bearing on the effect of the taking of a license

and the giving of the bond required as the condition of procuring a license upon the defendant's right to contest the validity of the price-fixing provisions of the act.

(1) The taking out of a license and the giving of a bond precludes the licensee from subsequently attacking the constitutionality of the statute requiring such license and bond.

This is the unquestioned law of New York as evidenced by many decisions in *Musco vs. United Surety Company*, 196 N. Y., 459. There the statute required all persons receiving deposits of money for the purpose of transmitting it to foreign countries to give a bond to the People of the State for the faithful holding and transmission of all such moneys. A person so receiving deposits gave a bond as required by the statute. The plaintiff sued upon the bond and the principal and his surety defended on the ground that the act pursuant to which the bond was executed was unconstitutional. The Court of Appeals held that they were estopped from questioning the constitutionality of the statute. Judge (now Chief Judge) Hiscock, rendering the opinion of the Court, said at pages 463, 465:

“The appellant and its principal have waived any question concerning the constitutionality of the act in question. That act in effect prohibited appellant's principal from carrying on the business of receiving deposits unless he should execute an undertaking as therein provided. Conversely, in effect, it authorized him to conduct such business if he should execute such a bond. He very well may have concluded that it would be to his advantage in the conduct of the business to give such an undertaking, whether he could

be compelled so to do or not, and he executed one. Having done this, and respondent's assignors having made deposits with him, as we must assume, on the faith of such undertaking, neither he nor his surety can now raise the question of constitutionality, for it is well settled that an individual may waive even constitutional provisions for his benefit when no question of public policy or public morals is involved. (*Mayor, etc., of New York vs. Manhattan Ry. Co.*, 143 N. Y., 1; *Cooley's Constitutional Limitations* [7th ed.], page 250.)

"If the principal could and did waive any question of constitutionality of the act, the appellant cannot raise such question, for certainly its position as a surety for a consideration is not any stronger than that of its principal.

"Appellant seeks to break the force of an apparent waiver by its principal by insisting that the undertaking was executed under duress, the act providing that a person who carried on the business in question without executing such undertaking should be guilty of a misdemeanor. * * *

"If the act requiring the principal to execute an undertaking was unconstitutional and void, he must be assumed to have known it at the time, and he was entitled to believe that no one would attempt to enforce against him an unconstitutional act. The mere possibility that some one in the future might attempt so to do was altogether too remote a consideration to operate as a coercive influence on his mind when he executed the undertaking which amounted to legal duress."

To the same effect is *Guffanti vs. National Surety Company*, 196 N. Y., 453.

In *Russo vs. Illinois Surety Company*, 141 App. Div., 690, the New York Appellate Division,

Second Department, decided that by going on the bond of its principal the defendant had waived its right to question the constitutionality of the act, although it might be admittedly unconstitutional. The Court said by Mr. Justice Thomas, at page 691:

"It is not within the power of the Legislature to compel a debtor to give security for an existing debt. May it then constrain the delivery of such security by prohibiting, in case of failure, the continuance of the business? If the act be unconstitutional, the parties could and did waive the invalidity of the requirement. (*Musco vs. United Surety Co.*, 196 N. Y., 459.)"

Huson vs. Brown, 90 Misc., 175, (New York Supreme Court) arose under Section 284 of the Agricultural Law requiring a commission merchant in farm produce to give a bond. In an action upon the bond given by the defendant, the Court refused to permit the defense that the act was unconstitutional. Mr. Justice Greenbaum, writing the opinion of the Court, said, at page 177:

"The defendant surety also attacks the constitutionality of the statute, but its principal, R. B. Brown, Inc., by giving the bond and receiving produce as a licensed commission merchant, has effectually waived its right to raise this question, and as surety defendant stands in no better position than its principal. *Musco vs. United Surety Co.*, 196 N. Y., 459. It follows that a verdict must be directed in favor of the plaintiff."

Similar in principle are the following decisions of this Court:

Pierce vs. Somerset Railway, 171 U. S., 641, 648.

Pullman Company vs. Kansas, 216 U. S., 56, 66.

Wall vs. Parrot Silver & Copper Co., 244 U. S., 407, 411.

Pierce Oil Corporation vs. Phoenix Refining Co., 259 U. S., 125, 128.

St. Louis Co. vs. Prendergast Co., 260 U. S., 461, 471.

It will be appropriate to call attention to other decisions bearing upon this aspect of the case.

In *Matter of Cooper*, 93 N. Y., 507, the Court said by Judge Danforth, at page 512:

“It is very well settled that a party may waive a statutory and even a constitutional provision made for his benefit, and that having once done so he cannot afterward ask for its protection. (*Lee vs. Tillotson*, 24 Wend., 337; *Embury vs. Conner*, 3 N. Y., 511; *Cooley’s Const. Lim.* 181.) The appellant is in this position. He participated as an actor in procuring the order which he now seeks to set aside, and took his chance for a satisfactory valuation of his property for the purpose contemplated by the act. To that end there was not only acquiescence on his part, but intelligent and efficient dealing with the matter and consent to the other. By this consent he must be deemed to have made his election and should be held to it.

In *Embury vs. Conner*, 3 N. Y., 511, it was decided that the right to challenge the constitutionality of a statute permitting the taking of private property for a private purpose without the consent of the property owner might be waived, Judge Jewett, saying (page 518):

"It was there held that a person might renounce a constitutional provision made for his benefit, and that if a private road be laid out pursuant to the statute, with the consent of the owner of the land, the proceeding was valid, and that such consent need not be in writing; that a parol consent was sufficient; and that the bringing of an action after the road was so laid out and his damages had been assessed, was a sufficient manifestation of consent, and an adoption of the machinery provided by the statute for effectuating the grant. *Lee vs. Tillotson* (24 Wend., 337) and *The People vs. Murray* (5 Mill, 472) are cases to show that a party may waive a constitutional as well as a statute provision made for his own benefit."

In *Mayor, etc. of New York vs. Manhattan Railway Co.*, 143 N. Y., 1, 26, Judge Peckham, later Mr. Justice Peckham of this Court, passed upon this question with his usual precision and clarity:

"The question is whether, by virtue of these various actions of defendant and its predecessors, together with the acceptance of subsequent legislation on the subject, based upon the assumed validity of the act of 1868, there has not been a waiver of the defense that the act was unconstitutional. Persons, or corporations even, may waive in some matters, and upon some occasions, a constitutional or statutory provision in their favor. *Embury vs. Conner*, 3 N. Y., 511; *In re Application of Cooper*, 93 id., 507-512; *In re Petition of K. R. Co.*, 98 id., 447-453; *Sentenis vs. Ladew*, 140 id., 463-466.) In the last cited case it is said: 'A party may waive a rule of law, or a statute, or even a constitutional provision, enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public morals are involved, and

having once done so he cannot subsequently invoke its protection.' Although the provision as to a local act containing but one subject, which shall be expressed in its title, is of a public nature and was placed in the Constitution for the purpose of preventing surprises as to the object and purpose of any proposed legislation, yet when an act has been so passed, and its enactments bear upon the private rights of an individual, the constitutional provision then becomes as to him, one which is, within the meaning of the expression, enacted for his benefit, and it is then a matter which such individual may, as to his private rights, waive the benefit of, and consent to perform or submit to the requirements of the act, the same as if the constitutional provision had not been violated. And when once such waiver has been made and such consent been given, the party so waiving and consenting is forever concluded thereby."

To the same effect are :

- People vs. Quigg*, 59 N. Y., 88, 89;
- People vs. Fire Assn. of Philadelphia*, 92 N. Y., 325, 326;
- Conde vs. Schenectady*, 164 N. Y., 263;
- Connors vs. People*, 50 N. Y., 240.
- Dodge vs. Cornelius*, 168 N. Y., 242;
- Shepard vs. Barron*, 194 U. S., 553, 568;
- Chicago-Sandoval Coal Co., vs. Industrial Commission*, 301 Ill., 389.

If then any part of this act be unconstitutional the defendant had the undoubted right to raise the point and test its constitutionality. But if he gave his bond and took out his license, as appears by the foregoing authorities, his right to attack the constitutionality of the law requiring such bond and license would have been lost.

(2) *If the licensing provision of the act standing by itself were constitutional, the defendant can not be charged with a misdemeanor for non-compliance therewith if the price-fixing clauses of the act are invalid and he would be precluded from attacking them, because of his compliance with the licensing provision.*

If this were not the law a citizen might be deprived of his property without due process of law and denied the equal protection of the law, as guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States.

This proposition was determined in *Ex parte Young*, 209 U. S., 123, 145-147. There the court had before it the question of the constitutionality of the Minnesota act creating a Railroad and Warehouse Commission, with rate-making powers, and providing certain penalties in the event that its provisions were violated. The Court held that while there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, nevertheless, where such validity can only be determined by judicial investigation and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts in order to test its validity, it in effect practically prohibits them from seeking such judicial construction and consequently denies them the equal protection of the law. Mr. Justice Peckham in rendering the opinion of the court enunciates this principle clearly (page 145):

“Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face

on account of the penalties. For disobedience to the freight act of the officers, directors, agents and employes of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. *The sale of each ticket above the price permitted by the act would be a violation thereof.* It would be difficult, if not impossible, for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. *The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. the necessary effect and result of such legislation must be to preclude a resort to the courts (either State or Federal) for the purpose of testing its validity.* The officers and employes could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the Court should decide that the law was valid. The result would be a denial of any hearing to the company."

In *Ex parte Young* the Court quotes with approval the words of Mr. Justice Brewer in *Cotting vs. Kansas City Stock Yards Company*, 183 U. S., 79, 102:

"It is doubtless true that the State may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

In the instant case if the defendant attempts to stand on his rights and refuses to give a bond and take out a license, as required by the act, for the purpose of raising the question of the constitutionality of this act, he is liable daily to arrest and conviction under the terms of the act for carrying on his business, which, as already shown, is inherently lawful.

In *Harrison vs. St. Louis & San Francisco R. R. Co.*, 232 U. S., 318, the Court passed on the constitutionality of a statute penalizing any one who resorted to the Federal Courts on the ground of diversity of citizenship. Chief Justice White said (page 331):

"Indeed, the statute goes much further, since when an application to remove is made, in order to prevent a judicial consideration of its merits even by the state court, it in effect commands the Judge of such court on the making of the application to refuse the same and to certify the fact that it was made, to a state executive officer, to the end that such officer

should without judicial action strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the Court below."

In *Mercantile Trust Company vs. Texas, etc., Ry. Co.*, 216 Fed., 225, the Circuit Court for the Eastern District of Louisiana, passed upon a statute similar to the one considered in the *Harrison case, supra*. There, too, the Court held that the penalties for disobeying such statute were so extreme that foreign corporations would generally be deterred from litigating the question of the right of the State to enact such amendment, and consequently it was violative of the Fourteenth Amendment of the Federal Constitution as depriving such corporation of its property without the due process of law. Saunders, D. J., passing on this point said at page 231:

"The penalties thus denounced against corporations which violate the constitutional amendment are so drastic that they would involve the immediate and certain ruin of the corporation. The defendant in this case is a common carrier, and its very existence depends upon its power to make contracts from day to day."

As shown above, the entire act is founded upon and inseparably bound up with the purpose of prohibiting the resale of tickets of admission at an advance greater than fifty cents a ticket.

(3) *That a statute unconstitutional in a part essential and vital to its whole scheme cannot be enforced by the courts in its other provisions is likewise a well settled principle.*

This principle has been recently laid down in a number of important cases. Thus in *Lemke vs. Farmers Grain Co.*, 258 U. S., 50, Mr. Justice Day at pages 59 and 60, said:

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce.

It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid Federal regulations of the same subject. *But the features of this act, clearly regulatory of interstate commerce, are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold.* It is apparent that without these sections the State Legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purposes. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it. *International Textbook Co. vs. Pigg*, 217 U. S., 91, 113, and cases cited."

In *International Textbook Co. vs. Pigg*, 217 U. S., 91, 112 the same doctrine was enunciated, Mr. Justice Harlan rendering the opinion of the Court (pages 112, 113):

"It results that the provision as to the Statement mentioned in Sec. 1283 must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part *of the same section* which provides that the obtaining of the certificate of the Secretary of State that such Statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas. Section 1283, looking at the object for which it was enacted, must be regarded as an entirety. These parts of the statute are so connected with and dependent upon each other that the clause relating to actions brought in the courts of Kansas cannot be separated from the prior clause in the *same section* referring to the Statement to be filed with the Secretary of State, and the former left in force after the latter is stricken down as invalid. As the clause about suits in the courts of Kansas *expressly refers* to the prior clauses *in the same section* prescribing the Statement to be filed with the Secretary of State, the clause relating to suits would be meaningless without reference to the latter. We cannot suppose, from the words of the statute, that the Legislature would have adopted the regulation about actions in the State courts except for the purpose of enforcing the prior clause in the same relating to the Statement to be filed with the Secretary of State. The several parts of the section are not capable of separation if effect be given to the legislative intent. *It is well settled that if a statute is in part unconstitutional the whole statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the statute that they cannot be separately enforced, or, if so enforced, will not effectuate the manifest intent of the Legislature.*" (Italics ours.)

The most recent case on the subject, *Hill vs. Wallace*, 259 U. S., 44, 70 is especially applicable here. It involved the validity of a "future" trading act, which imposed a tax of twenty cents a bushel on all contracts for the sale of grain for future delivery, with certain exceptions. Section 11 of the statute directed that "*if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.*" This was held to be merely an assurance that separable valid provisions may be enforced consistently with legislative intent, but that it did not, and could not, empower the courts to amend inseparable provisions of the act by inserting limitations which it did not contain. Chief Justice Taft, discussing this phase of the case, said:

"Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they cannot be separated. Section 11 did not intend the Court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court. In *United States vs. Reese*, 92 U. S., 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (page 221):

'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.

Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' *Trade-Mark Cases*, 100 U. S., 82; *Butts vs. Merchants & Miners Transportation Co.*, 230 U. S., 126."

In *Pollock vs. Farmers Loan & Trust Co.*, 158 U. S., 601 it was held that when a single comprehensive scheme of taxation is provided for in an act and the different parts are interdependent, the whole statute must fall by reason of the unconstitutionality of one of the essential provisions.

So in *Howard vs. Illinois Central R. R. Co.*, 207 U. S., 463, the First Employers' Liability Act was held unconstitutional because of provisions which it contained, regulating intrastate commerce.

It is likewise settled law that even if a statute or ordinance contains provisions which, in another setting, might be free from the taint of unconstitutionality, if they are so interwoven in the texture of the statute or ordinance with other provisions, which are void, as to preclude the idea that they can be of operative fitness to effectuate the will of the law-making body, the entire statute or ordinance is rendered of no effect.

While it may be conceded that a statute or ordinance may be in part constitutional and in part unconstitutional, if the parts are wholly independent of each other, and that in such case the unconstitutional part only will be rejected, as

stated in 36 *Cyc.* 977, this rule is "subject to several important limitations,": 1, that the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning and purpose that it cannot be presumed that the Legislature would have passed the one without the other; 2, where the invalid section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, 3, where the obnoxious part is the consideration and inducement of the whole act, or, 4, where the constitutional parts are ineffective and unenforceable in themselves in accordance with the legislative intent.

Thus in *Sherrill vs. O'Brien*, 188 N. Y., 185 it was held, where one part of an apportionment act violates the Constitution the entire statute thereby becomes invalid.

In *Hauser vs. North British & Mercantile Ins. Co.*, 152 App. Div., 91, affd. 206 N. Y., 455, those parts of the Insurance Law which undertook to regulate the insurance brokerage business were under consideration. The act provided that no person should act as agent for an underwriter who has not complied with the provisions of the Insurance Law; that every agent should procure a certificate of authority from the Superintendent of Insurance; that such certificate might be revoked by the Superintendent of Insurance for violation of any provision of the Insurance Law; that no agent whose certificate had been revoked should be entitled to another for a period of one year after such revocation, and that a license fee of \$10 was to be paid by an applicant where his place of business was in a city of the first or second class. The

statute then provides, that before any broker's certificate of authority should be issued by the Superintendent of Insurance there should be filed in his office a written application for such certificate setting forth various facts, among others "(d) that the applicant is engaged or intends to engage, in good faith, principally in the insurance business, or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business, and is not a salaried employee of any person, partnership, association or corporation on whose property or risks he receives or expects to receive applications for insurance, and does not make the application for a certificate of authority for the sole purpose of securing commissions on insurance written on his own property or risks." The plaintiff was a lawyer, as well as an insurance broker, and was actively engaged in the practice of his profession. It was claimed that he could not recover for his broker's commissions because of that fact. He met this contention with the proposition that the statute was unconstitutional, since it amounted to an interference with his liberty to follow a lawful pursuit. The courts decided that he was right. In the course of the discussion it was argued that, even assuming that the limitation of subdivision (d) was invalid, the remainder of the statute, which required a license, was valid. The Court, however, declined to recognize the soundness of that proposition. Mr. Justice Miller speaking for the Appellate Division, said:

"The question then arises whether the invalid provision may be rejected, and the rest of the act saved. We would have no difficulty on that head, if, instead of requiring the statement in the application for a certificate, the

provision had simply been that a person obtaining such a certificate should make that his principal business. In that case, the invalid provision could be stricken from the act. But the requirement that the statement shall be made in the application necessarily implies that the Superintendent of Insurance shall not issue a certificate except upon an application containing the said statements. The act then provides in effect that a license must be obtained and that the Superintendent shall not issue it except upon a statement that the applicant is engaged or intends to engage principally in the insurance business or in that business in connection with a real estate brokerage business. As that restriction is thus imposed upon the issuance of a certificate, it seems to us to be a necessary part of the scheme requiring a certificate at all. For how are we able to say whether the Legislature would have required a license without imposing that condition upon its issuance? Indeed, subdivision 'd' is the only condition imposed, the other statements required in the application being merely descriptive of the applicant. While it is suggested that the Superintendent of Insurance should have ignored the invalid provision, and that he might be compelled by mandamus to issue a certificate to the plaintiff, that argument loses sight of the fact that the Legislature authorized him to issue a certificate only upon an application containing the said statement. It would hardly do to say that an administrative officer, acting upon the authority of the Legislature, should ignore the only condition imposed upon his action on the theory that the Legislature had no power to impose the condition, although but for it the authority itself might not have been conferred."

Judge Gray, speaking for the Court of Appeals, said, in the course of his opinion:

“The argument that the invalid provision may be rejected and the rest of the section preserved has been sufficiently answered by the Appellate Division. The opinion of that Court holds, in substance, that the requirement as to the statement in the application, in question, was a restriction ‘imposed upon the issuance of a certificate’ and was ‘a necessary part of the scheme requiring a certificate at all. For how are we able to say whether the Legislature would have required a license without imposing that condition upon its issuance? * * * Subdivision ‘d’ is the only condition imposed; the other statements required in the application being merely descriptive of the applicant.’ They say, further, in answer to the suggestion that the superintendent might ignore the invalid provision, that ‘the argument loses sight of the fact that the Legislature authorized him to issue a certificate only upon an application containing the said statement.’ ”

See also,

Rathbone vs. Wirth, 150 N. Y., 477, 480.

Jones vs. Jones, 104 N. Y., 234;

Lawton vs. Steele, 119 N. Y., 241;

Matter of Metz vs. Maddox, 189 N. Y., 472.

(4) *The provision in § 174 of the statute “that in case it is judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect its validity or effect of the remaining provisions of the article” does not militate against the authorities considered under the foregoing subdivisions of this Point.*

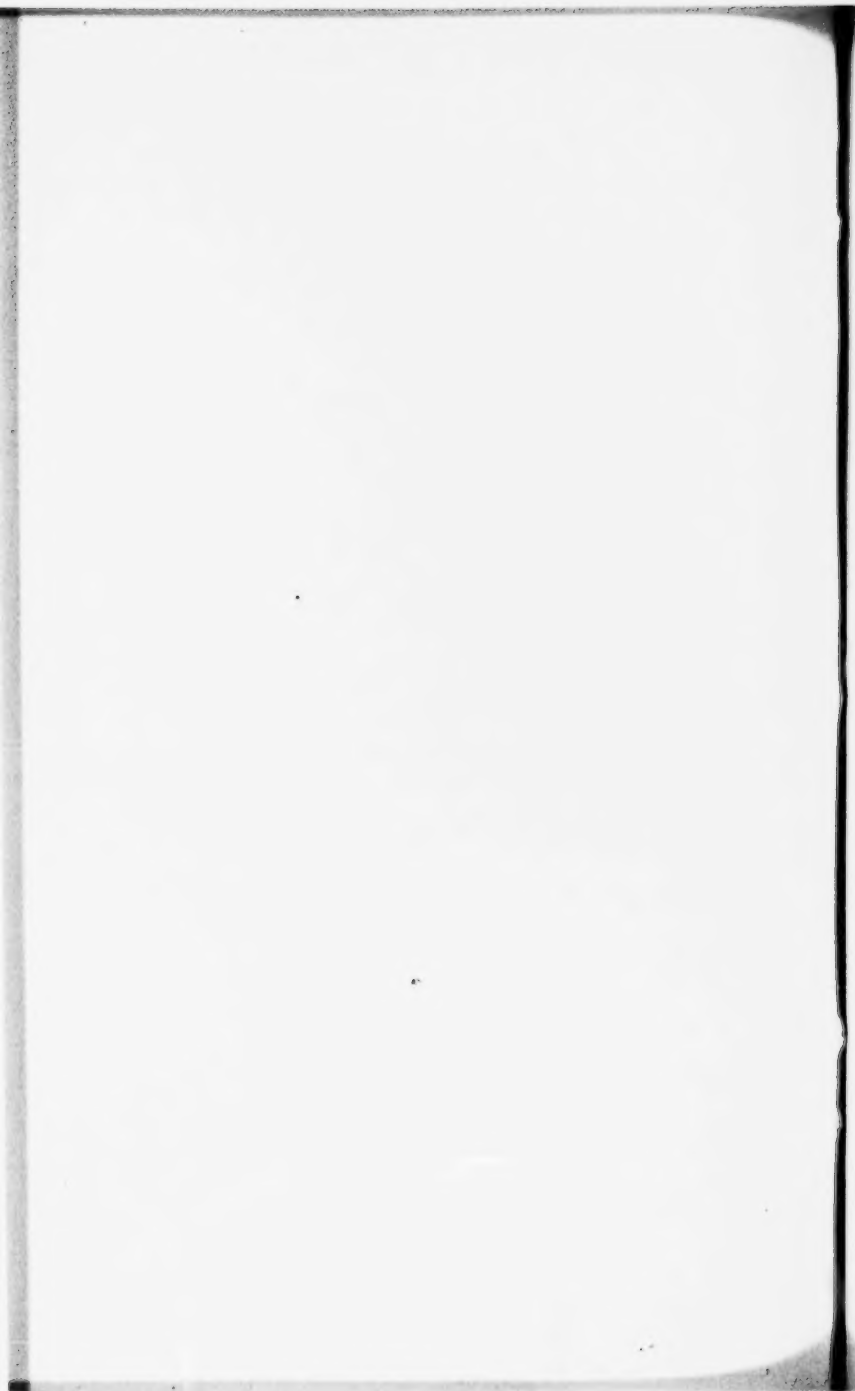
Hill vs. Wallace, 259 U. S., 70, 71.

(5) *In none of the Courts below was there any attempt to sever the license provision from the price-fixing provision. It was taken for granted that the latter was inseparable from the former, and that the license provision could not be enforced, if the price-fixing clause was invalid.*

V.

It is respectfully submitted that the judgment of conviction should be reversed, the proceedings dismissed, and the defendant discharged.

LOUIS MARSHALL,
For Plaintiff-in-Error.



To be argued by

ROBERT D. PETTY.

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 349.

REUBEN WELLER,

Plaintiff-in-error,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant-in-error.

BRIEF FOR DEFENDANT-IN-ERROR.

✓ JOAB H. BANTON,

District Attorney,

New York County.

ROBERT D. PETTY,

FELIX C. BENVENGA,

Of Counsel.

April, 1925.



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To be argued by
ROBERT D. PETTY.

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 349.

REUBEN WELLER, Plaintiff-in-error, <i>against</i> THE PEOPLE OF THE STATE OF NEW YORK, Defendant-in-error.	}
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BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This case involves the Constitutionality of Section 168 of the General Business Law of the State of New York—(added by Chap. 590, Laws of 1922)—prohibiting the reselling of theatre tickets without a license.

It comes before this Court on a writ of error directed to the Court of Special Sessions of the City of New York, in the State of New York, to review a judgment by which the plaintiff-in-error, the defendant below, was sentenced to pay a fine of twenty-five dollars and in default of the payment thereof to stand committed to the City Prison for five days, rendered upon conviction of a misdemeanor—reselling theatre tickets without a license.

The original judgment of conviction was rendered in the Court of Special Sessions on February 16, 1923. An appeal was taken therefrom by the plaintiff-in-error to the Appellate Division of the Supreme Court of the State of New York, First Department, and the judgment of conviction was affirmed (two of the five judges dissenting), on the 30th day of November, 1923 (*People v. Weller*, 207 N. Y. App. Div. 337). An appeal was thereupon taken by the plaintiff-in-error to the Court of Appeals of the State of New York and the judgment of the said Appellate Division was affirmed (one of the seven judges dissenting), on February 19, 1924 (*People v. Weller*, 237 N. Y. 316).

Upon the affirmance of the judgment of conviction by the Court of Appeals, that Court, in accordance with the practice and procedure of the State of New York (N. Y. Code of Criminal Procedure §§548, 549), remitted the record and proceedings to the Court of Special Sessions of the City of New York, in which Court the original judgment had been rendered, and an order was there entered upon the *remittitur* making the judgment of the Court of Appeals the judgment of the Special Sessions and directing that the original judgment of conviction be enforced and carried into execution and effect (Record, pp. 53, 54, fols. 90-93).

The Statute Involved.

The General Business Law (L. 1909, chap. 25) was amended by L. 1922, chap. 590, by inserting therein a new article, as follows:

"ARTICLE X-B.**THEATRE TICKETS.**

§167. **MATTERS OF PUBLIC INTEREST.** It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§168. **RESELLING OF TICKETS OF ADMISSION; LICENSES.** No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

§169. **BOND.** The comptroller shall require the applicant for a license to file with

the application therefor a bond in due form to the people of the State of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the State of New York, conditioned that the obligor will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article, the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.

§170. REVOCATION OF LICENSES. In the event that any licensee shall be guilty of any fraud or misrepresentation or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

§171. SUPERVISION OF COMPTROLLER. The comptroller shall have the power, upon complaint of any citizen or of his own initiative,

to investigate the business, business practices and business methods of any such licensee if in the opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

§172. RESTRICTION AS TO PRICE. No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

§173. VIOLATIONS; PENALTIES. Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

§174. CONSTITUTIONALITY OF ARTICLE. In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall

not affect the validity or effect of the remaining provisions of the article.

§2. This act shall take effect immediately."

This act became a law April 12, 1922.

The Information.

The information charged that the defendant "on the 26th day of October, 1922, at The City of New York, in the County of New York, unlawfully did engage in the business of reselling tickets of admission to a theatre and place of amusement and did resell to one John Cunniff, a ticket of admission to a certain theatre and place of amusement called Palace Theatre, without first having obtained the necessary license thereof (*sic*) from the Comptroller of the State of New York as required by law" (Record, p. 2, fol. 3).

The Facts.

JOHN CUNIFF, a police officer, testified that on the 26th day of October, 1922, he went to the place of business of Reuben Weller, the plaintiff-in-error, at 1560 Broadway, in the Borough of Manhattan, City and County of New York. He further stated:

"Q. What did you do after entering his place of business? A. I purchased two tickets and paid for them, and I asked him if he was in the business of selling tickets, *and I asked him if he had a license to resell tickets under this law and he said he did not, and I placed him under arrest.*

Q. Did you ask him anything with reference to the law of the State Comptroller? A. I did.

Q. Are these tickets that were purchased by you? A. Yes, sir.

Q. And that he sold you? A. Yes, sir.

Q. How much money did you pay the defendant for these two tickets? A. My recollection was \$2.00 apiece, \$4.00 for the two tickets.

Mr. Hogan: I offer the two tickets in evidence.

The Court: Received. (Marked People's Exhibit One in Evidence.) (Two tickets.)" (Record, p. 3, fols. 6, 7.)

Q. Did you ask the defendant if he had taken out a bond in pursuance to the law? A. I did, and I also asked him if he was aware of the new law that required him to have a bond and he said he was, and I said, up to the present you have not taken out a bond, and he said, no.

Mr. Hogan: Will it be conceded by Mr. Marshall, that People's Exhibit One in Evidence, two Palace Theatre tickets, are tickets of admission to the Palace Theatre and entitled the holder to admission on the date stamped thereon, to the matinee of Thursday, October 26th, 1922.

Mr. Marshall: I will concede that.

Q. Did you ask the defendant, if he was in the business of reselling theatre tickets? A. I did.

Q. What did he say in response to that question? A. He said, he was for the last ten years" (Record, p. 4, fol. 8).

Counsel for plaintiff-in-error made the following concessions:

"Mr. Hogan: Will it be conceded that the defendant had not complied with Section 168 of the General Business Law.

Mr. Marshall: I will concede that Mr. Weller did not have a license and has not had a license and that he did not give a bond, and that he did not comply with the requirements of the statute, which is Chapter 590 of the Laws of 1922.

Mr. Hogan: With that concession, that is the People's case.

Mr. Marshall: I will also admit that he did not make an application because I advised him that the law was unconstitutional.

Mr. Hogan: People's case" (Record, p. 4, fols. 8, 9).

The Questions Involved.

It will be observed that the statute contains two salient provisions:

I. It prohibits persons from engaging in the business of selling theatre tickets unless they obtain a license from the comptroller. "Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually" (§168).

II. It places a restriction upon the amount which licensed ticket sellers may charge the public for theatre tickets. It provides that they shall not resell any such ticket "in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry" (§172).

It is contended by the plaintiff-in-error that the price restriction feature of the statute is inseparably connected and interwoven with the licensing

feature of it and that consequently, if the price restriction feature is invalid, the entire statute will have to fall.

We contend (1) that the price restriction provision is not so blended with the licensing provision that the validity of the latter would be necessarily dependent upon the validity of the former.

We also contend—although we maintain the question is not really involved in this case—(2) that the price restriction provision is a valid exercise of the police power.

POINT I.

The provision requiring ticket sellers to obtain a license is valid.

It is elementary that courts will always presume that the legislature did not intend to exceed its constitutional powers.

Matter of McAneny v. Bd. of Estimate,
232 N. Y. 377, 389;

Devoy v. Craig, 231 N. Y. 186, 189.

“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”

United States v. Jin Fuey Moy, 241 U. S.
394, 401;

Bratton v. Chandler, 260 U. S. 110, 114;

Panama R. R. Co. v. Johnson, 264 U. S.
375, 390.

It is also elementary that all property and all occupations are subject to the exercise of the police power. As to a statute requiring a person who kept an employment agency to take out a license, the Court in *People ex rel. Armstrong v. Warden* (183 N. Y. 223, 226), said:

“All business and occupations are conducted subject to the exercise of the police power. Individual freedom must yield to regulations for the public good. It may be laid down as a general principle that legislation is valid which has for its object the promotion of the public health, safety, morals, convenience and general welfare or the prevention of fraud or immorality.”

The following rule was stated in *People v. Beakes Dairy Co.* (222 N. Y. 416, 427):

“Any trade, calling or occupation may be reasonably regulated if ‘the general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the legislature can properly protect them.’ ”

In *Munn v. Illinois* (94 U. S. 113), the Court speaking of the “police powers”—which Chief Justice Taney had defined as being “nothing more or less than the powers of government inherent in every sovereignty”—“the power to govern men and things”—said [pp. 125, 126]:

“Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this coun-

try from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. * * * From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation. This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'. This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use,

and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

As to the tests to be applied to determine when a business is "affected with a public interest," in *Ratcliff v. Stock-Yards Co.* (74 Kans. 1, at page 6; 86 Pac. 150), the Court said:

"Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression, as in cases of monopoly, and the like, are circumstances affecting property with a public interest."

In *Wolff Co. v. Industrial Court* (262 U. S. 522), the Court divided the kinds of business "said to be clothed with a public interest" into three classes and, at page 538, said:

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

Also see article in the *Yale Law Journal*, December, 1923, pages 196-201, entitled "The Fate of the Kansas Industrial Court."

a. The business of conducting a theatre, though in one sense private, is not "strictly" private.

It is a business that is "affected with a public interest" (*Aaron v. Ward*, 203 N. Y. 351, 356; *People v. King*, 110 N. Y. 418, 427; *People ex rel. Cort Theater Co. v. Thompson*, 238 Ill. 87; L. R. A., 1918-D 382, 388). It is because the business is "affected with a public interest" that governmental regulation is justified (*Aaron v. Ward, supra*).

As said by the Court of Appeals in *People v. King (supra)* at page 427:

"The business of conducting a theater or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theaters and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution."

In *Aaron v. Ward (supra)* the Court said [pp. 355-356, 357]:

"In several of the reported cases the keeping of a theater is spoken of as a strictly private undertaking, and it is said that the owner of a theater is under no obligation to give entertainments at all. The latter proposition is true, but the business of maintaining a theater can not be said to be 'strictly' private. In *People v. King* (110 N. Y. 418) the question was as to the constitutionality of the Civil Rights Act of this state which made it a misdemeanor to deny equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theaters or

other places of public resort or amusement regardless of race, creed or color, and gave the party aggrieved the right to recover a penalty of from fifty to five hundred dollars for the offense. The statute was upheld on the ground that under the doctrine of *Munn v. Illinois* (94 U. S. 113) theaters and places of public amusement (the case before the court was that of a skating rink) *were affected with a public interest which justified legislative regulation and interference* (Italics ours) * * * That public amusements and resorts are subject to the exercise of this legislative control shows that they are not entirely private."

In *Opinion of Justices to the Senate* (247 Mass. 589, 595), it is said:

"In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theaters and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. *People v. King*, 110 N. Y. 418, 428; *Donnell v. State*, 48 Miss. 661, 680, 681; *Aaron v. Ward*, 203 N. Y. 351, 356. See Civil Rights Cases, 109 U. S. 3, 41, 42.

The counsel for the plaintiff in error relies upon *Woolcott v. Shubert*, (217 N. Y. 212), to support his contention that the "business of conducting a theatre and consequently of selling or procuring tickets of admission is not affected by a public interest" (Brief of Plaintiff-in-Error, pp. 49, 53). In that case, at page 216, the Court says:

"At the common law a theatre, *while affected by a public interest* which justified

licensing under the police power or for the purpose of revenue, is in no sense public property or a public enterprise." (*Italics ours.*)

That the business of conducting a theatre is "affected with a public interest" is very evident when the purposes of the theatre are considered. Theatres are operated to furnish recreation and amusement to the public. They are the chief means of recreation which the people have after cessation from their daily labors. The theatres afford that relaxation of mind which is conducive to health, comfort and good morals.

There is also another important function of the theatre in that it promotes public education. As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative. Therefore the theatre becomes more essential to the welfare of the public; it becomes more "affected with a public interest." See

People v. Weller, 207 N. Y. App. Div. 337, 341, 342.

Opinion of Justices to Senate, 247 Mass. 589, 594-595.

The trend of modern thought as to the functions of the theatre is shown by a recent speech delivered by Hon. James M. Beck, Solicitor General of the United States, at the jubilee of the Pennsylvania Society held in New York City on December 15, 1923. The subject of his speech was "Our Silver Jubilee: A Retrospect," and he is

reported to have made during his speech the following statement:

"You may agree with me in this diagnosis, but you may ask, what is the remedy?"

Time would not permit me to discuss it even though I had the ability. One thing is clear—that nothing can stop the influence of a mechanical age in lessening the hours of labor, and if there is to be any salvation for human society, it must lie in the better utilization by man of his lengthening hours of leisure. That he may wisely use these, it is necessary that he should be given a truer sense of the values of human life, and this should be the mission of the great institutions which mold human thought, like the church, the school, the press, the theatre."

The New York Times, Sunday, December 16, 1923, Section 1, pages 1 and 18.

The President of the United States in his recent address to Congress on December 5, 1923, in discussing the fiscal condition of the country, said:

"The amusement and educational value of moving pictures ought not to be taxed."

The New York Times, Friday, December 7, 1923, page 4, col. 2.

Historically considered theatres may be regarded as "affected with a public interest."

A. E. Haigh in his book, "The Attic Theatre," at page 4, says:

"To provide for the amusement and instruction of the people was, according to the Greeks, one of the regular duties of a gov-

ernment; and they would have thought it unwise to abandon to private venturers an institution which possessed the educational value and wide popularity of the drama."

See also

People v. Weller, 207 N. Y. App. Div. 331, 342.

In the time of ancient Rome theatres were regulated by law.

Encyclopaedia Britannica, 11th Ed., Vol. 26, pp. 736, 737.

The operation of a theatre was a proper municipal purpose.

"Municipalities were encouraged to build theatres (Dig. 1, 10, 3)."

Encyclopaedia Britannica, 11th Ed., Vol. 26, p. 736.

That the business of operating a theatre is "affected with a public interest" is shown by the fact that the state may give the power to a city to establish and conduct a theatre the same as in ancient times. In *Ruling Case Law* (Vol. 19, p. 722) there is the following statement:

"The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. Thus, the appropriation of money for public concerts has been held to be proper. So, too, the erection of an auditorium has been regarded as properly falling within the purposes for which a municipal corporation may

provide. Generally speaking anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes, and on this ground it has even been held that authority to erect and conduct an opera house may be conferred upon a municipal corporation."

See:

Egan v. City and County of San Francisco, 165 Cal. 576; 133 Pac. Rep. 294, 295, 296;

Los Angeles County v. Dodge, 197 Pac. Rep. 403, 406, 407 [Cal.];

Schieffelin v. Hyman, 236 N. Y. 254, 265, 266.

It is true that in *State ex rel. City of Toledo v. Lynch* (88 O. St. 71; S. C. 102 Northeastern Reporter 670) the Court decided that the City of Toledo did not under its charter have the power to establish and maintain a moving picture show. The question there determined was whether the establishment and operation of a moving picture show is within the meaning of the expression "the powers of local self-government."

Counsel for plaintiff-in-error does not agree, it seems, with the notion of the ancient Greeks that the theatre is an institution of educational value.

At page 69 in his brief he states:

"Nor, judging from the majority of plays which now degrade the stage and are offensive to a considerable part of the public, may it be said that they contribute to the public education."

Counsel seem rather to favor the notion of the Puritans and the Pilgrim Fathers who "would have been astounded" had it been suggested to them that the theatre was "affected with a public interest," as that phrase is used in the act now under consideration. That there are plays which "now degrade the stage" is a controlling reason why the theatre—a great institution for molding human thought—should be regarded as affected with a public interest and under the supervision of the State. See:

Opinion of Justices to Senate, 247 Mass. 589, 593-594.

That there are degrading plays is an abuse of an educational institution, and the Penal Law of New York provides for the punishment of such abuse. See

Penal Law, §§1140a and 1530, subdivision 2;

People v. Doris, 14 N. Y. App. Div. 117, appeal dismissed 153 N. Y. 678.

Since the business of operating a theatre is "affected with a public interest" it is universally recognized that it is proper for the state to require a license. In *People ex rel. Duryea v. Wilber* (198 N. Y. 1, 9), the court said:

"Licenses have been required for theatres and places of public amusement in this state for nearly a century. * * * The tendency of such places is to attract a crowd, and it is said that they require more or less of governmental supervision and regulation."

In *Mutual Film Corp. v. Ohio Indus'l Comm.* (236 U. S. 230), at page 244, this Court said:

"As pointed out by the District Court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation."

The kinds of business for which licenses or permits have been required are innumerable. Where the business is one which affords opportunities for fraud, deception, discrimination and the like, the power to license is unquestionable. See:

Brazee v. Michigan, 241 U. S. 340;
People ex rel. Armstrong v. Warden, 183 N. Y. 223;
Lieberman v. Van De Carr, 199 U. S. 552; aff'g. 175 N. Y. 440;
Stern v. Met. Life Ins. Co., 169 App. Div. 217, aff'd. 217 N. Y. 626;
Crowley v. Christensen, 137 U. S. 86;
Gundling v. Chicago, 177 U. S. 183;
Cargill Co. v. Minnesota, 180 U. S. 452;
Lehon v. Atlanta, 242 U. S. 53.

And the state may delegate the authority to grant such licenses or permits to administrative boards or officers, and vest discretion in them to grant or withhold them.

Lieberman v. Van De Carr, 199 U. S. 552; aff'g. 175 N. Y. 440;
Gundling v. Chicago, 177 U. S. 183;
Crowley v. Christensen, 137 U. S. 86;
Bradley v. Richmond, 227 U. S. 477;
Lehon v. Atlanta, 242 U. S. 53;
Stern v. Met. Life Ins. Co., 169 App. Div. 217, 220, aff'd. 217 N. Y. 626;

People v. Kaye, 212 N. Y. 407, 416;
People ex rel. Schwab v. Grant, 126 N. Y.
 473;
Douglas v. Noble, 261 U. S. 165, 168.

Recently the courts have held constitutional, statutes that required real estate brokers and real estate salesmen to procure licenses from such boards and officers.

Bratton v. Chandler, 260 U. S. 110;
Riley v. Chambers, 181 Cal. 589; 185 Pac.
 Rep. 855.

b. The business of a theatre ticket broker is so intimately related to the business of conducting a theatre that likewise the legislature has power to impose as a condition to engage in such an occupation that a license should be obtained. This close relationship is clearly shown in the case at bar by the evidence introduced by the defendant.

DAVID MARKS, a theatre ticket broker and a witness for the defendant, testified on his direct examination as follows:

"Q. In a general way, how is that business carried on and has it been carried on? A. We have charge accounts with various people in the City of New York and outside of New York and we do a cash business, and a charge of fifty cents is still maintained in the large offices in the City of New York.

Q. And occasionally you charge more? A. Yes, sir.

Q. Why is that? A. We are compelled to buy merchandise months in advance, and if the show is a poor show the loss is ours.

Q. You look upon these tickets as merchandise? A. Yes, sir.

Q. Whom do you get these tickets from?
A. Theatre managers.

Q. How do you get them from the theatrical managers? A. *We buy them in blocks, each office is allowed so many seats.*

Q. The theatrical managers put on a production, whatever the play may be? A. Yes, sir.

Q. Then they say to the ticket brokers, that they will allow them to have a certain number of tickets for that production? A. Yes, sir.

Q. When is that part of the arrangement made? A. Before the show is cast and before we know anything about who is in the show, we are sent for and told how many tickets we are to get and each office has to pay, is compelled to buy.

Q. Who sends for you? A. The managers of the various productions" (Record, pp. 5, 6, fol. 10).

"Q. You are telling us just how the brokers get their tickets from the various theatre owners. You say, that when an attraction is about to be put on the boards, before there has been a production of the play at all, you are sent for, the various brokers, by the theatre owners and a conversation takes place? A. Yes, sir.

Q. What is the nature of the conversation?
A. We are going to produce—the manager of the theatre representing the owner of the theatre, we are going to produce a show four weeks from next Monday night and it is going to open at a certain theatre, and they say, how many seats do you want for that show for eight weeks in advance? We have asked for time to see how many we can use for that production at that particular theatre, and we are not given time in many cases and we must purchase the number of tickets, and we have got to buy them for eight weeks in advance, and we don't know the name of the

show or the cast, and we are compelled to buy them at four and five dollars a piece plus the war tax and compelled to pay for them and pay for them at that rate for eight weeks in advance, running into an investment of fifty or sixty thousand dollars.

Q. *In other words, you finance the theatrical performance?* A. Yes, sir.

Q. And you have to pay in advance? A. Yes, sir, and it takes hundreds of thousands of dollars.

Q. Suppose the play is not a success? A. They are left on our hands. We have a return privilege of twenty-five, sometimes fifteen and sometimes ten. If a person wants three tickets and we make a \$1.50 total profit on tickets that may have cost four or five dollars apiece.

Q. That has been going on all these years? A. Yes, sir.

Q. And that is still the practice today? A. Yes, sir.

Q. Do they ever take these plays off the boards before the full period of time? A. I have not heard of two cases where they stopped the show.

Q. You have not heard of more than two or three cases, where notwithstanding the fact the the play is a failure they have stopped the performance? A. Yes, sir.

Q. And because you are bound to pay this amount, it is a dead loss if you cannot see (*sic*) the tickets? A. Yes, sir; a loss of thousands of dollars on a production.

Q. And that is your experience? A. Yes, sir.

Q. They allocate to the several ticket brokers of the city the number of tickets that they may have and the number that they are required to take if they want any tickets? A. Yes, sir, right" (Record, pp. 78, fols. 14, 15).

As attending places of amusement constitutes one of the chief means of recreation of the inhabitants of the city and the business of ticket selling is closely connected with that of conducting places of public amusement, and as the business of conducting a theatre is a business affected with a public interest, it naturally follows that the business of ticket selling is one which properly comes within the power of the State to regulate and to require a license to carry on such business. In particular the State has this power, if abuses have developed in the business as it is ordinarily carried on.

The distribution of tickets is very largely in the hands of ticket brokers. It is easy to see that these ticket brokers have many opportunities for practising fraud upon and deceiving the public. The ticket broker might sell tickets to persons for seats already sold to other persons. He might discriminate against particular persons or classes of persons in selling and distributing the tickets. He might sell tickets for places of amusement that are closed or for shows that are not running. He might deceive the persons as to the location of the seats. And his business being generally conducted at a place distant from the theatre, the purchaser will very often have difficulty in obtaining redress.

To quote the words of the Supreme Court in *Brazee v. Michigan* (241 U. S. 340, 343)—relative to employment agencies:

“The general nature of the business is such that unless regulated many persons may be exposed to misfortune against which the legislature can properly protect them.”

It is conceded that evils flow from the present system of selling theatre tickets.

People v. Thompson, 238 Ill. 87; 119
Northeastern Rep. 41, 45, 46.

Abuse frequently results therefrom and patrons of theatres suffer imposition.

Collister v. Hayman, 183 N. Y. 250, 254.

In the case at bar the Court below said:

“The existence of extortion due to present unregulated conditions in the business of re-selling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest. The Legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse. The proposed remedy encroaches upon the liberty of the individual only to the extent that the Legislature might properly regard as reasonably calculated to remedy the abuse, and the people have placed upon the Legislature the responsibility of determining whether the remedy is wise and will promote the public welfare” (*People v. Weller*, 237 N. Y. 316, 331).

See also

People v. Weller, 207 N. Y. App. Div.
337, 339.

Opinion of Justices to Senate, 247 Mass.
589, 596.

That there are abuses in this business of ticket selling is evidenced by the legislation that has been passed in the various states. See:

People v. Thompson, 238 Ill. 87; 119
Northeastern Reporter 41, and cases
cited.

During the year 1923 at least two states, Illinois and New Jersey, passed statutes as to the sale of tickets to places of amusement.

Laws of Illinois, 1923, pages 322, 323;
Laws of New Jersey, 1923, page 143, ch.
71.

During the following year, 1924, while a similar bill was pending in the Massachusetts Senate, the advice of the Justices of the Supreme Judicial Court of that State was sought on the constitutionality of the bill. In a carefully considered opinion, in which the opinion of the New York Court of Appeals in the case at bar was referred to, the Senate was advised that the bill, if enacted into the law, would be constitutional. See:

Opinion of Justices to Senate, 247 Mass.
589.

Thereafter, an act was passed, containing the substantial features of the proposed bill. See:

*Acts and Resolves of Massachusetts for
1924*, c. 497, p. 551.

It is submitted that this conception of different law-making bodies that the business of selling theatre tickets so far affects the public welfare

as to require legislative regulation, cannot be accidental and without cause. See:

German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 412.

Governor Miller in his approval of the bill (Chap. 590, Laws 1922) said that the bill was aimed at "an undoubted abuse" (Brief of Plaintiff-in-Error, page 10).

In *People v. Newman* (109 N. Y. Misc. Rep. 622, 660), it was admitted by the Court that there was "evil flowing from this business" and that it "should be corrected." But the Court seemed to think that the evil could only be remedied by the theatrical managers.

At page 660 the Court said:

"The remedy, in my judgment, can come from the producing managers of the theatres."

The evidence set forth above of David Marks, a witness for the plaintiff-in-error shows how hopeless it is to expect any reform from "the producing managers of the theatres."

The following excerpts from the opinion of the New York Appellate Division in the case below show how little can be expected from this "remedy":

"The method now pursued in the disposal or resale of tickets was described at the trial. It is interesting in that it shows a community of interest between the theatre managers and the brokers who sell to the public, or an underwriting of the attraction by the speculator for which the public must pay. The

hope or expectation that the abuses or evils in theatre ticket speculation may be remedied by the producing managers is dispelled by the testimony in this case. * * *

This testimony gives an idea of the theatre ticket business which is carried on by the brokers, and how intimately connected it is with that of the theatre and theatre owners and managers.

It is apparent from this record that the theatres and ticket brokers have an understanding or arrangement for the resale of tickets. The modern method of selling tickets indicates that there is a working agreement between the managers or owners and the speculator or ticket brokers."

People v. Weller, 207 N. Y. App. Div. 337, 347, 348.

See also:

Opinion of Justices to Senate, 247 Mass. 589, 596.

To concede that the only cure for the evil is some remedy initiated by the managers of theatres is to admit that the State is powerless to promote the general welfare of the people and to accomplish the purposes for which governments are founded. See:

People ex rel. Durham R. Corp. v. La Fetra, 230 N. Y. 429, 442, 443.

When evils result from the carrying on of a business one of the most appropriate ways to check these evils is to require the persons engaged in this business to take out licenses on the terms prescribed by law.

State v. Conlon, 65 Conn. 478; 33 Atl. Rep. 519, 521.

An inspection of the language of §167 of the statute under consideration gives rise to the reasonable inference that the legislature has investigated the subject of selling theatre tickets and has determined it is necessary to regulate the business “*for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.*”

The determination of the legislature “is entitled at least to great respect” (*Bloch v. Hirsch*, 256 U. S. 135, 154).

The language of the United States Supreme Court, in *Middleton v. Texas Power & Light Co.* (249 U. S. 152, 157), was:

“There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.”

See also:

Ward & Gow v. Krinsky, 259 U. S. 503, 521.

c. Nor is this statute objectionable upon the ground that it vests discretion in the comptroller to grant or withhold a license.

The authority to grant or withhold is based upon “the honest exercise of a reasonable discretion” (*Lieberman v. Van De Carr*, 199 U. S. 552, 559). The presumption is that such discre-

tion will be properly exercised—that the law will be properly administered (*People ex rel. Lieberman v. Van de Carr*, 175 N. Y. 440, aff'd 199 U. S. 552; *People v. Kaye*, 212 N. Y. 407, 416; *Stern v. Met. Life Ins. Co.*, 169 App. Div. 217, 220); and this holds good until, in a concrete case, the contrary is made to appear.

In *People of the State of New York ex rel. Lieberman v. Van de Carr, Warden* (199 U. S. 552, 562), Mr. Justice Day said:

“These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual under sanction of State authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal Court.”

See also:

Douglas v. Noble, 261 U. S. 165, 168.

The fact that a law may be mistakenly administered is no ground for holding the law itself unconstitutional.

People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 539;

Mont. Co. v. St. L. M. Co., 152 U. S. 160, 170;

Arrowsmith v. Harmoning, 118 U. S. 194;
N. O. W. W. Co. v. L. S. R. Co., 125 U.
 S. 18;
St. P. &c. Ry. v. Todd Co., 142 U. S. 282;
Howard v. Kentucky, 200 U. S. 164.

It is not what the person administering the law may arbitrarily conceive he may do and does that determines the validity of the law; it is what may lawfully be done under the law as properly and legally construed and applied that governs.

People ex rel. Berger v. Warden, 176
 N. Y. App. Div. 602, 606.

It will be time enough to pass upon the question when some person who was arbitrarily refused a license comes forward with a prayer for relief.

It will be observed that Governor Miller in approving the act (Chapter 590, Laws 1922), stated:

"The licensing feature by itself is undoubtedly valid" (Italics ours).

POINT II.

The price restriction feature of the statute is valid.

The business of conducting theatres, to which business that of the selling of theatre tickets has become a fixed adjunct, is not strictly private. It is one "affected with a public interest" (*People v. King, supra*; *Aaron v. Ward, supra*; see also *People ex rel. Cort Theatre Co. v. Thompson*, 238

Ill. 87; 119 Northeastern Reporter, 41, 45; *Opinion of Justices to Senate*, 247 Mass. 589, 594-595).

The business of ticket selling being so interwoven with the business of operating a theatre that the latter business cannot be regulated without exercising the police power over the former business, it follows that the business of ticket selling is likewise "affected with a public interest." Consequently the State has the power to regulate the business of ticket selling (*Opinion of Justices to Senate*, 247 Mass. 589).

It may be said of this business as was said of the insurance business that "it having become 'clothed with a public interest' and therefore" it was "subject 'to be controlled by the public for the common good.' "

German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 415.

a. *This power of regulation embraces the fixing of reasonable charges to the public for the services rendered.*

In *Bloch v. Hirsch* (256 U. S. 135, 157), the language of the Court was:

"But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulations has been settled since *Munn v. Illinois*, 94 U. S. 113."

The business of ticket selling stands substantially on the same footing as the grain elevator and like cases (*Munn v. Illinois*, 94 U. S. 113). It comes directly within the principle of the *Munn*

case (*supra*)—the principle of which has not only been adhered to but expanded and advanced to meet conditions as they arise. There, it was held that the State could fix a maximum charge for storing and elevating grain. The basic ground of the decision was that the business was one affected with a public interest, and that, hence, a reasonable charge for the service rendered could be prescribed.

In speaking of the police powers, the Court said [p. 125]:

“Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.”

The decision in the *King* case (110 N. Y. 418) was based largely upon the decision in the *Munn* case; and it establishes the proposition that places of public amusement fall in the same category as those businesses referred to in the opinion in the *Munn* case.

It is submitted that the cases usually cited (*People v. Steele*, 231 Ill. 340; *Ex parte Quarg*, 149 Cal. 79) as to the sale of theatre tickets do not contain the price restriction feature such as the case at bar (*Opinion of Justices to Senate*, 247 Mass. 589, 597).

It will be observed in these cases the legislation condemned, either (a) prohibited the business altogether or (b) prohibited the exacting of any additional charge. But that is an altogether different proposition from prescribing a reasonable charge for the service (*vid. People ex rel. Cort Theatre Co. v. Thompson*, 238 Ill. 87; 119 Northeastern 41, 43-45; *People v. Weller*, 207 N. Y. App. Div. 337, 353; *Opinion of Justices to Senate*, 247 Mass. 589).

That the Legislature may fix a reasonable maximum charge for the service where the matter is one in which the public has an interest has been settled by the decision in the *Munn* case. The *Munn* case has been frequently followed, approved and extended.

Budd v. New York, 143 U. S. 517.

Brass v. Stoeser, 153 U. S. 391.

German Alliance Ins. Co. v. Kansas, 233 U. S. 389.

b. Regulation is warranted because exorbitant rates have been charged and there is a virtual monopoly.

One of the chief evils of the business of ticket selling is the charge of *exorbitant rates* on the part of ticket sellers. This evil has been recognized for many years; and in several states at-

tempts have been made by the passage of statutes and ordinances to correct this abuse. See:

People v. Thompson, 238 Ill. 87; 119
Northeastern Reporter 41.

There even have been proprietors of theatres, it seems, who have tried to control the matter by contract and to prevent their patrons being left "to the mercy of speculators." See:

Collister v. Hayman, 183 N. Y. 250, 254.

In *People v. Thompson*, *supra*, at page 45, the Court stated:

"It is true that individuals are not forced to buy tickets from scalpers, and are acting upon their own volition, but they are making their choice between paying the higher price and not witnessing the performance to which the public are invited."

In *Collister v. Hayman* (183 N. Y. 250, 254), decided in 1905, the Court states the following as to the "ticket speculator":

"A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it part of the contract and a condition of the sale."

It is evident that one of the abuses that led to the adoption of the statute (Chap. 590, Laws

1922, Sec. 167), was that the Legislature had found that "exorbitant rates" had been charged. The statute was passed, it seems, "for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."

According to the testimony introduced by the defendant it seems the choice seats can only be obtained through the ticket sellers or brokers.

David Marks, a witness called on behalf of the defendant, in his direct examination testified as follows:

"Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office? A. No, sir. *The best they could get for any show is the fifteenth or sixteenth row.*

Q. The best seats have been sold? A. The choice seats.

Q. If anyone desires to go to the theatre for them at night, they would be far back in the house? A. Yes, sir" (Record, p. 10, fol. 19).

It also appears from the testimony of this witness given on cross-examination that there is a monopoly as to the sale of these choice seats.

The witness testified as follows on cross-examination:

"Q. How many ticket speculators are there? A. Ticket brokers.

Q. Yes, how many? A. Tyson and Company have eighteen branches, would you call it one office, or call each branch an office?

Q. Call each branch a separate office. A. About thirty offices.

Q. There are thirty offices where you can buy tickets from ticket brokers? A. Yes, sir.

Q. And they are controlled by how many people? A. Probably a dozen or fifteen" (Record, p. 14, fol. 25).

From this testimony of a witness of the defendant—a "theatre ticket broker" (fol. 27)—it appears that the choice seats in the theatre can not be obtained at all from the box office of the theatre.

"The best they could get for any show is the fifteenth or sixteenth row" (Record, p. 10, fol. 19).

Therefore if a person desires to obtain a choice seat he must obtain it from one of the offices of the ticket sellers and these offices are controlled by a few men.

"Q. And they are controlled by how many people? A. Probably a dozen or fifteen" (Record, p. 14, fol. 25).

In *Ex parte Quarg* (149 Cal. 79)—quoted by counsel for appellant—it was said by the Court:

"The sale of a theater ticket at an advance upon the original purchase price, or the business of reselling such tickets at a profit, is no more immoral, or injurious to public welfare or convenience, than is the sale of an ordinary article of merchandise at a profit. It does not injure the proprietor of the theater; he must necessarily have parted with the ticket at his own price and upon his own terms before such resale can be made. *It does not injure the second buyer; he must have had the same opportunity as the first buyer to purchase a similar ticket, and no greater right thereto, and having neglected that opportunity, or being unwilling to undergo the necessary inconvenience and willing*

to pay a higher price rather than forego the privilege which the other by his greater diligence and effort has obtained, the transaction is just so far as he is concerned." (Italics ours.)

It will be observed, according to the testimony of the witness for the defendant, David Marks, in the case at bar as to the choice seats the "second buyer" would not "have had the same opportunity as the first buyer to purchase a similar ticket." He could not have obtained such a ticket even if he had exercised the greatest "diligence and effort."

The best the "second buyer" could have obtained "for any show" would have been "the fifteenth or sixteenth row". Certainly it cannot be truly said "the transaction is just so far as he is concerned".

These men having this control can fix whatever price they desire for these seats. Thus an instrument designed to afford amusement, recreation and education to the people—poor as well as rich—is so controlled that only the rich can afford to purchase the best seats. The rich alone can pay the extortionate rates exacted.

Again the same situation is present that existed in the time of ancient Athens.

A. E. Haigh in his work, "The Attic Theatre", at page 330, states:

"Until the close of the fifth century every man had to pay for his place, although the charge was a small one. But the poorer classes began to complain that the expense was too great for them, and that the rich

citizens bought up all the seats. Accordingly, a measure was framed directing that every citizen who cared to apply should have the price of the entrance paid to him by the state. The sum given in this way was called 'theoric money'. It used formerly to be supposed, on the strength of statements in Plutarch and Ulpian that this theoric system was introduced by Pericles. But the recently discovered Constitution of Athens has now shown that it was of much later date."

See also:

The Theatre of the Greeks by J. W. Donaldson, pages 309, 310.

American Cyclopaedia (Vol. 15, pp. 685, 686).

In Rome theatres were regulated by the State.

"The seats were allocated by the state and the care of the building committed to certain magistrates (Novel cxlix. 2)."

Encyclopaedia Britannica, Vol. XXVI, 11th Ed., page 736.

It is well settled that the existence of a virtual monopoly gives the legislature power to regulate rates.

People v. Budd, 117 N. Y. 1, 26, 27; *affd.* 143 U. S. 517.

People ex rel. Durham R. Corp. v. La Fetra, 230 N. Y. 429, 445.

The conditions in the case at bar are similar to those which led this Court to hold in *German Insurance Co. v. Kansas* (233 U. S. 389), that the business of insurance is so far affected with a

public interest as to justify legislative regulation of its rates. At pages 416 and 417 the language of this Court is:

“We may venture to observe that the price of insurance is not fixed over the counters of companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that ‘it is illusory to speak of a liberty of contract.’ ”

c. The power to regulate rates does not have its foundation necessarily in any grant or privilege conferred by the State.

It will be observed that, although the power to regulate rates is sometimes placed upon the ground that a special franchise or privilege has been granted, yet the power may exist though no such franchise or privilege has been granted. See:

People v. Budd, 117 N. Y. 1, 26, 27; *affd.*
143 U. S. 517;

German Alliance Ins. Co. v. Kansas, 233
U. S. 389, 411.

This principle has been very clearly stated in *Ratcliff v. Stock-Yards Co.*, 74 Kansas 1; 86 Pac. 150; 6 L. R. A. (N. S.) 834; 118 Am. St. Rep. 298; 10 Ann. Cas. 1016.

In an unanimous opinion the Court said at page 6:

“Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression, as in cases of monopoly and the like, are circumstances affecting property with a public interest. Police regulations of the business of dealing in patent rights have been maintained on the theory that it affords great opportunity for imposition and fraud. (*Mason v. McLeod*, 57 Kan., 105; 45 Pac., 76; 41 L. R. A., 548; 57 Am. St. Rep., 327; *Allen v. Riley*, 71 Kan., 378; 80 Pac., 952.)

“Public necessity and the public welfare are the broad general grounds upon which the right of legislative control is based, rather than that a special privilege has been conferred in consideration of which public control is conceded or required. In *Munn v. Illinois*, 94 U. S., 113, 24 L. Ed., 77, Chief Justice Waite, referring to the right to regulate business under the police power said: ‘The Government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good’ (p. 125). Upon these considerations the business of banking has been subjected to control, and the right to regulate the interest which may be charged for the use of money is now unquestioned. The police power is exercised in controlling the business of insurance, the operation of mills, hotels, theatres, wharves, markets, warehouses for the storage of grain and tobacco, common carriers, the collection and distribution of news, and the business of supplying and distributing water and gas. Some of these rest upon

considerations of health, or the safety or the convenience of the people, but all fall within the general grounds of public necessity and public welfare."

In pursuance of this principle the State would not be precluded from regulating the prices charged by ticket sellers although they received no special franchise or grant from the State.

d. A business may become affected with a public interest owing to new conditions.

Assuming that the business of ticket selling in its origin may not have been "affected with a public interest," yet such abuses have grown up in connection with the business—a business concerned with the amusement, recreation and education of the people—and so many have been subjected to extortionate charges that the business has become a proper subject for regulation under the police power.

In *German Alliance Ins. Co. v. Kansas* (233 U. S. 389, 411), the language of the Court was:

"The cases need no explanatory or fortifying comment. They demonstrate that a business by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of

certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.' "

Again, when evils are admitted, great discretion should be allowed the legislature in devising remedies. If it has been demonstrated by experience that a remedy is not sufficient to check the evil, then certainly the legislature can under the police power adopt a new and more drastic remedy. It cannot be in such a case that the legislature is powerless. This power to adopt new remedies when old remedies fail is illustrated by the legislation as to lotteries, carrying concealed weapons and regulating the sale of intoxicating liquors.

A statute that made it a crime for a person to have in his possession lottery tickets without regard to the person's knowledge of what the articles were, was within the police power and did not deprive the accused of liberty without due process of law.

Ford v. State, 85 Md. 465; 37 Atlantic Reporter, 172.

In the *Ford* case (*supra*) the Court, at page 173, said:

"An examination of our statutes will show numerous efforts on the part of our legislatures to prevent the lottery business from being carried on in this state."

Therefore it would seem that the above drastic statute was upheld on the ground that other statutes had failed to prevent "the lottery business."

In *Noble State Bank v. Haskell* (219 U. S. 104, 110) a statute of Oklahoma compelling a state bank to contribute to a guarantee fund to protect deposits was held constitutional although there was "no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business."

The Court seemed to hold that this remedy was appropriate to prevent the evils that the Oklahoma legislature anticipated from "free banking."

Many attempts have been heretofore made to regulate the theatre ticket selling business in this city.

It seems that proprietors of theatres even have attempted to protect their patrons by contract from paying extortionate prices for tickets.

Collister v. Hayman, 183 N. Y. 250.

An ordinance was passed excluding ticket sellers from carrying on their business "on or in any street in the city."

The Code of Ordinances of the City of New York, Chapter 3, Art 1, §12.

See also:

Penal Law, §1534 (Added by L. 1921, Ch. 12).

Yet, as the evils associated with the business continued—and especially the charging of extortionate rates—the Legislature was under a duty to pass the present statute and fix a rate. Its

inaction would have been a confession that it was "powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

People ex rel. Durham R. Corp. v. La Petra, 230 N. Y. 429, 443.

e. *The Legislature has determined that "the price of or charge for admission to theatres" "is a matter affected with a public interest."*

If there was any doubt about the business of selling theatre tickets being affected with a public interest that doubt was removed by the Legislature itself when it provided as follows in the statute:

"§167. MATTERS OF PUBLIC INTEREST. It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses" (Laws 1922, ch. 590).

Evidently the legislature inquired into the facts and determined after investigation that the price charged for theatre tickets was "a matter affected with a public interest." "The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments" (*McLean v. Arkansas*, 211 U. S. 539, 547).

It is incumbent upon the courts to give great weight to the legislative determination.

The rule is stated in *Patson v. Pennsylvania* (232 U. S. 138, 144) as follows:

“Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in the facts.”

In *Jones v. City of Portland* (245 U. S. 217), the question arose as to whether the establishment of a municipal wood yard was for a public purpose. At page 221 the Court said:

“While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information.”

In *Bloch v. Hirsch*, (256 U. S. 135, 154) the Court said:

“No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Court. *Shoemaker v. United States*, 147 U. S. 282, 298. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 606. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227. *Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228, 230. But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect.”

In *Los Angeles County v. Dodge* (51 Cal. App. 492; 197 Pac. Rep. 403, 406), the Court stated the following doctrine:

“When the legislature or a board of supervisors or city council engaged in the exercise of legislative functions, proceeds upon the assumption that a matter concerning which it acts is one affecting the public interest or designed to promote the general welfare, the assumption is conclusive upon the courts, unless it is plainly apparent to them that the view entertained by the legislative body is without just foundation.”

In upholding the so-called “housing laws” (*People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429, 440), the language of the Court was:

“Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed; promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the law-making power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld.”

In the recent case of *Schieffelin v. Hylan*, (236 N. Y. 254, 264, 265), this Court said:

“At the threshold of such an investigation we encounter and, of course, subscribe obedience to the well-settled principle that when the legislative judgment has declared a given

act to be impressed with a purpose and character which bring it within a constitutional provision, courts are loath to interpose their judgment and to nullify the legislative act by declaring it unconstitutional. (*Loan Assn. v. Topeka*, 20 Wall. 655, 665; *Green v. Frazier*, 253 U. S. 233; *Weismer v. Vill. of Douglas*, 64 N. Y. 91)."

In *Armour & Co. v. North Dakota*, (240 U. S. 510, 513), the United States Supreme Court considered the statute requiring lard when not sold in bulk to be put in pails or other containers holding a specified number of pounds net weight and labeled as specified. In holding that such act was a constitutional exercise of police power, the Court said:

"We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the Courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws. *Rast v. Van Deman & Lewis*, ante, page 342; *Tanner v. Little*, ante, page 369."

In a recent case in this Court (*Radice v. People of the State of New York*, 264 U. S. 292) the constitutionality of the New York statute prohibiting the employment of women in restaurants between certain hours was upheld. At page 294, the language of the Court was:

“Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state Legislature here determined that night employment of the character specified was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.”

But it is argued by counsel for plaintiff-in-error that certain of these cases “proceed upon an entirely different principle, namely, that an emergency existed which made it necessary for the state to interfere temporarily, and not permanently in the interest of public health” (Brief of Plaintiff-in-Error, page 45).

But in one of these cases (*People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429), the Court stated that such regulatory power was not confined to “an emergency”. At page 445, the Court said:

“Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. (*Lincoln Trust C. v. Williams Bldg. Corp.*, 229 N. Y. 313; *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U. S. 269). Laws restricting the use of property do not deal directly with the question whether a private business may be limited in its return to a

reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action. (*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. Stoeser*, 153 U. S. 391; *German Alliance Inc. Co. v. Kansas*, 233 U. S. 389; *Oklahoma Operating Co. v. Love*, 252 U. S. 331; *Holter Hardware Co. v. Boyle*, 263 Fed. Rep. 134; *American Coal Min. Co. v. Special C. & F. Comm.*, *supra* [268 Fed. Rep. 563, 565]).

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling. (*Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355.)”

In enacting the present statute the Legislature was dealing with the abuses of a system of long standing. A system that directly affected the welfare of the people as to their amusement, recreation and education. If the Legislature can act in an emergency, why not act when there is a chronic case?

Again it is submitted that this Court in determining whether local conditions justify state legislation not only give great weight to the estimate of the state Legislature as to the existence of evils, but also gives a cumulative effect to the recognition of the courts of the same state that those evils exist.

In *Green v. Frazier* (253 U. S. 233), at page 422, this Court said:

“Under the peculiar conditions existing in North Dakota which are emphasized in the opinion of its highest court, if the State sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, its legislature and its people, we are not prepared to say that it is within the authority of this Court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision.”

See, also, *Jones v. City of Portland*, 245 U. S. 217.

In the case at bar, not only has the Legislature determined “that the price of or charge for admission to theatres” “is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses”, but the Court of Appeals of New York has stated:

“The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are

calculated to injure large numbers of the public in connection with a business which is *at least to some degree affected with a public interest* (Italics ours). The Legislature under the police power has in our opinion clearly the right under these circumstances to attempt to remedy the abuse." *People v. Weller*, 237 N. Y. 316, 331.

See also:

Opinion of Justices to Senate, 247 Mass. 589.

The plaintiff-in-error contends that one conducting a theatre, to say nothing about a ticket seller, is conducting a private business and cites *Collister v. Hayman*, 183 N. Y. 250, to support his contention.

It is true in that case, at page 254, the Court stated:

"The defendants were conducting a private business which, even if clothed with a public interest, was without a franchise to accommodate the public, and they had the right to control it the same as the proprietors of any other business, subject to such obligations as were placed upon them by the statute hereinafter mentioned."

It will be noticed that the Court does not deny that the business may be "clothed with a public interest."

To understand the opinion in *Collister v. Hayman*, *supra*, it is necessary to bear in mind the question involved. The proprietors of the Knickerbocker Theatre in the City of New York were trying to accomplish the very purpose which the

present statute is designed to effect. They were attempting by contract to protect their "patrons from extortionate prices"; they did not want to leave their "patrons to the mercy of speculators."

The Court at page 254 stated:

"The main question presented for decision is whether the defendants had the right to make a contract with purchasers upon the condition printed in the ticket. There is no restraint by statute against such a condition and it is not opposed to public policy. There is no tendency toward monopoly, for any one can buy and sell theatre tickets, provided the sales are not made on the sidewalk where the tickets themselves provide they cannot be sold. The law does not prevent the proprietor of a theatre from making reasonable regulations for the conduct of his business and imposing such reasonable conditions upon the purchasers of tickets as in his judgment will best serve the interests of that business. A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted. A regulation of the proprietor, which tends to protect his patrons from extortionate prices is reasonable and he has the right to make it a part of the contract and a condition of the sale. Unless he can control the matter by contract and by conditions appearing upon the face of the ticket which is evidence of the contract, he may not be able to control it at all, but must leave his patrons to the mercy of speculators, such as the plaintiff, who, as he alleges, was accustomed to make at least \$4,000 a year from his business. That amount, of course, came out of patrons of the theatre and if other ticket speculators

carrying on the same business at various theatres in the City of New York are equally successful, the additional expense to theatre-goers must be very large."

Because the Court held that a contract made by proprietors of a theatre to protect their patrons from imposition was valid, it is evident that the Court never intended to hold that the legislature could not give the same protection through the medium of a statute. That no such inference can properly be drawn from the opinion in *Collister v. Hayman*, *supra*, is very clearly pointed out in *People v. Thompson*, 238 Ill. 87; 119 Northeastern Reporter 41. At pages 44 and 45 the Court, in discussing *Collister v. Hayman*, *supra*, says:

"Much is said by counsel for appellee about the quotation in the Steele Case from *Collister v. Hayman* * * * and other statements of the same character about the nature of the business of running a theatre. The meaning and effect of the quotation and its utter and absolute inapplicability to this case will be apparent when the facts are stated. The defendants were managers of the Knickerbocker Theater, and the plaintiff *Collister* brought the action to restrain them from interfering with his business of selling on the sidewalk and outside of the prohibited limits tickets of admission to the theater, which was his business and from which he derived an income of \$4,000 a year. On the ticket there was printed 'Tickets purchased on the sidewalk will positively be refused at the door.' The court said the business was a private one clothed with a public interest, and the owner had a right to regulate the terms of admission in any reasonable way, and had a right to prohibit ticket scalping by

the notice on the ticket that if bought from a ticket scalper it would be refused at the door. Surely neither the Court of Appeals nor this court intended an affront to ordinary intelligence by holding that because the owners of the Knickerbocker Theater could prohibit ticket scalping the city of New York or a municipality of this state could not. The quotation and similar statements in the Steele Case were evidently for the purpose of making clear that the business was a private one."

Counsel for plaintiff-in-error contends that the legislature has no more right to regulate the price at which tickets can be sold than it would have a right to regulate the prices of products of the soil and the industry of artisans.

It is submitted that, if there was a monopoly in these products created by middlemen who made exorbitant profits, there is no doubt that the legislature would have the power to protect the people by curbing the greed of the profiteers as it has attempted to do in passing the present statute.

Counsel for plaintiff-in-error asks whether it would be within the purview of the legislative power to fix the prices which jewellers could charge, such prices being "based upon the charges of the diamond cutters at Amsterdam and London, or of the miner at Kimberly." Again he asks as to the validity of a regulation whereby vendors of rugs were limited "to making sales at a fixed percentage over their cost at Bagdad or in Bokhara, or that a licensed dealer in oil paintings was prohibited from disposing of them at a price exceeding to the extent of \$100 that paid to the artist * * *." (Brief of the Plaintiff-in-Error, p. 22.)

These illustrations in respect to jewellers, dealers in rugs and oil paintings are in regard to luxuries and have no application to the present statute which deals with a necessity; which aims to secure amusement, recreation and education for the poor as well as the rich.

However, it is submitted that if dealers in rugs or precious stones carried on their business in such a way as to impose upon and deceive their customers, the legislature would have a right to regulate the business. (See Penal Law, §§422-431.)

In a recent case in Maryland (decided Jan. 11, 1923) an ordinance of Baltimore City prohibiting auction sales of jewelry, except in certain cases, was held constitutional within the Constitution of the United States 14th Amendment §1.

Mogul v. Gaither, 142 Md. 380; 121 Atlantic Reporter 32.

But counsel for plaintiff-in-error answers (at p. 22):

“The purchase of luxuries has been instanced because of the similarity between them and tickets of admission to the theatre or the opera.”

It is submitted that counsel for defendant in claiming the similarity between luxuries and “tickets of admission to the theatre or the opera” concedes the contention of the prosecution that by “extortion” and “exorbitant rates” the theatre ticket brokers have made a *luxury* of that which in its nature is a *necessity*. The language of the Appellate Division is appropriate:

"As the population becomes more congested in great cities, as the hours of labor become shorter, the necessity of affording recreation, amusement and education to the inhabitants becomes more imperative."

People v. Weller, 207 N. Y. App. Div. 337, 341, 342.

The lessening of the hours of labor owing to the influence of this mechanical age make the theatre a necessity.

In the language of the Court in *State v. Harper* (196 Northwestern Reporter 451, 455 [Wis.]), "the luxuries of one decade become the necessities of another."

Thus becoming necessities, the Legislature had an undoubted right to intervene.

As was said by the Court below:

"Yet the power of the Legislature in a proper case to 'promote the public welfare' by regulating or restricting acts which interfere with free negotiation between the consumers and producers of a commodity in common use and impede the operation of the laws of supply and demand should not be doubted (see opinion of Chief Justice White in *Standard Oil Co. v. United States*, 221 U. S., at pp. 50 to 58), and we see no distinction in principle between commodities and privileges or licenses such as tickets of admission, if there exists a general public demand for them and they are in common use."

People v. Weller, 237 N. Y. 316, 328, 329.

Assuming the business affected has no connection with the manufacture or sale of luxuries; conceding that it is an ordinary manufacturing

or trading business or the business of the professional man. Yet the cases recognize that there is a great difference between such businesses as to the power of the State to regulate and the business of operating a place of public amusement.

In *Jones v. Broadway Roller Rink Co.* (136 Wis. 595; 118 Northwestern 170, 172), the Court said:

“Public accommodation and amusement is the test prescribed by our statute. The amusement offered by the usual skating rink is to the public as such and generally. It differs radically from the tender of accommodation offered by the ordinary merchant or professional man who, while he impliedly, by opening the door of his shop or office, invites everyone to enter, does so only for the purpose of selling to each individually either service or merchandise. This distinction has been often noted.”

In *People ex rel. Cort Theater Co. v. Thompson* (238 Ill. 87; 119 Northeastern Reporter 41, 45), the language of the Court was:

“The question here is whether the Constitution protects a theatre owner in a scheme by which an applicant for a ticket is told that the house is sold out, and upon going to the ticket scalper is permitted to select the part of the house where he desires to sit and the ticket scalper turns to the telephone and directs the theatre to send up a ticket, which is sent and sold at an advanced price.

The business of the theatre owner or manager is private in the sense that no franchise from the state is required, but it is no more private than the business of hawkers, peddlers, pawnbrokers, keepers of ordinaries, circuses, or other shows, and amusements

which invite the public generally to attend and exist entirely by the public. A place of amusement to which the public are generally invited upon no condition but the payment of a fixed charge is public in a general sense, and it differs radically from accommodations offered by a merchant or professional man, who, while he invites every one to enter, does so only for the purpose of selling to each individual services or merchandise. *Jones v. Roller Skating Rink*, 136 Wis. 595, 118 N. W. 170, 19 L. R. A. (N. S.) 907."

See also:

Goff v. Savage, 122 Wash. 194; 210 Pacific Reporter 374, 375;

Brown v. J. H. Bell & Co., 146 Ia. 89; 123 Northwestern Reporter 231, 235.

The decision of the United States Supreme Court in *Adkins v. Children's Hospital*, (261 U. S. 525) as to the Minimum Wage Act, it is submitted is not applicable to the case at bar. The question involved in those cases is stated as follows by the Court at page 539:

"The question presented for determination by these appeals is the constitutionality of the act of September 19, 1918, providing for the fixing of minimum wages for women and children in the District of Columbia. 40 Stat. 960 c. 174."

It is apparent from the following excerpts of the majority opinion that the question did not arise as to the reasonableness of a rate fixed by the Legislature as to a business affected with a public interest. The Court said at page 546:

"There is, of course, no such thing as absolute freedom of contract. It is subject to a

great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest:

1. *Those dealing with statutes fixing rates and charges to be exacted by business impressed with a public interest.*

There are many cases, but it is sufficient to cite *Munn v. Illinois*, 94 U. S. 113. The power here rests upon the ground that where property is devoted to a public use the owner thereby, in effect, grants to the public an interest in the use, which may be controlled by the public for the common good to the extent of the interest thus created. It is upon this theory that these statutes have been upheld and, it may be noted in passing, so upheld even in respect of their incidental and injurious or destructive effect upon pre-existing contracts. See *Louisville and Nashville Railway Company vs. Motley*, 219 U. S. 467. In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable."

At page 554, the Court further stated:

"If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a

law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee.”

The minimum wage law did not deal “with any business charged with a public interest.” It was not confined to kinds of business where it is recognized that it is proper under the police power to impose a license as a condition to engage in the business. There was no evidence that there was a monopoly warranting regulation by law. It was not, the Court says, “for the prevention of fraud.”

In all these important particulars it differed from the case at bar.

In *Radice v. The People of the State of New York* (264 U. S. 292), the Court referred to *Adkins v. Children's Hospital*, *supra*, stating at page 295:

“The statute in the *Adkins* Case was a wage-fixing law pure and simple. It had

nothing to do with the hours or conditions of labor. We held that it exacted from the employer 'an arbitrary payment for a purpose and upon a basis having no causal connection with the business, or the contract or the work' of the employee * * *."

In *Charles Wolff Packing Company v. Court of Industrial Relations of the State of Kansas* (262 U. S. 522), the Court considered the validity of the "Court of Industrial Relations Act of Kansas" and the conclusion of the Court as announced by the Chief Justice was (at p. 544):

"We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law."

At pages 535 and 536 of the opinion the Court gave the following classification of the different kinds of businesses clothed with a public interest:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills. * * *

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. * * *

It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest', as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

At page 538, the Court further said:

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before."

Attention in particular is called to the statement of the Court, "There is no monopoly in the preparation of foods." It does not appear that the statute in the above case was to correct abuses, to protect the public from "exorbitant charges and arbitrary control," (see page 538), nor to prevent fraud.

It is submitted that the theatre business according to the record in the case at bar comes squarely within the third class of kinds of busi-

ness "clothed with a public interest" according to the classification of *Wolff Co. v. Industrial Court*, *supra*.

At page 538, the Court says:

"In nearly all of the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

The business of conducting a theatre is so concerned with the amusement, recreation and education of the people that it can be likewise said "the thing which gave the public interest was the indispensable nature of the service." Again "the exorbitant charges and arbitrary control to which the public" not only "might be" but are "subjected without regulation" clothes the theatre business "with a public interest."

No doubt there is confusion in the cases as to when a business is affected with a public interest.

There is no arbitrary formula which solves this question. The meaning of this expression "affected with a public interest" depends upon the nature of the business, how it comes in contact with the public and the evils either actually associated with the business or reasonably feared.

This expression "affected with a public interest" means one thing in connection with the business of a common carrier, it may have a narrower meaning as applied to the business of insurance. It may have one meaning as to the regulation of the business of an innkeeper, its

meaning in reference to the business of a theatre may be broader.

This distinction is clearly brought out in *Chas. Wolff Packing Company v. Court of Industrial Relations of the State of Kansas*, *supra*, at pages 538, 539 and 540 the Court said:

"It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies

with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public-interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the 14th Amendment."

It is instructive to apply the above doctrine to a comparison of some of the cases discussing the nature of the business of operating a theatre.

In *Aaron v. Ward* (203 N. Y. 351, 356) the Court said that the "business of maintaining a theater cannot be said to be 'strictly' private." The Court further stated, referring to *People v. King* (110 N. Y. 418), that a statute securing "equal enjoyment of any accommodation, facilities and privileges of inns, common carriers, theaters or other places of public resort or amusement regardless of race, creed or color" was upheld "on the ground that under the doctrine of *Munn v. Illinois* (94 U. S. 113) theaters and places of pub-

lic amusement (the case before the Court was that of a skating rink) *were affected with a public interest which justified legislative regulation and interference.*" (Italics ours.)

On the other hand in *Woolcott v. Shubert* (217 N. Y. 212, 216) while the Court admitted that a theatre was "affected by a public interest which justified licensing under the police power or for the purpose of revenue," held that it was "in no sense public property or a public enterprise" and therefore at common law the proprietor could decide "who shall be admitted or excluded."

An analysis of these cases demonstrates that the meaning of "affected with a public interest" as applied to theatres as well as other kinds of business depends "on the feature which touches the public, and on the abuses reasonably to be feared" (See *Wolff Co. v. Industrial Court*, *supra*, at page 539).

When there is a monopoly, when the purpose is to safeguard "the public against fraud, extortion, exorbitant rates and similar abuses," when there are not only "abuses" which are "reasonably to be feared" but "abuses" that actually exist, then certainly the business is "affected with a public interest" and comes within the police power for the purpose of regulation. Otherwise it must result that the State is powerless to accomplish those purposes for which governments are founded.

f. *The restriction that no licensee shall resell a ticket "at a price in excess of fifty cents in advance of the price printed on the face of such ticket" is reasonable.*

The fixing of a rate is a legislative function and as applied to those carrying on a business that is affected with a public interest will be upheld, if it is reasonable.

Chicago &c. Railway Co. v. Wellman,
143 U. S. 339, 344;

Reagan v. Farmers' Loan & Trust Co.,
154 U. S. 362, 398;

Ratcliff v. Wichita Union Stockyards Co.,
74 Kans. 1; 86 Pacific Reporter 150,
154.

Assuming that the Court can in this action inquire into the question whether the above excess price provision is reasonable, the price established by the legislature is "at least *prima facie* evidence of what is reasonable and just."

See:

Reagan v. Farmers' Loan & Trust Co.,
154 U. S. 362, 395.

Further, conceding the evidence introduced by the defendant is true and relevant, it does not overcome the presumption in favor of the reasonableness of the excess price fixed by the Legislature.

David Marks, a witness for the defendant, testified that the brokerage business in which he was interested sold over three hundred thousand tickets a year and "made a good comfortable living," but had not taken out a license (Record, p. 14, fol. 25).

The witness further testified as to the profit that his concern made:

"Q. Do you have an established rate of profit? A. *It is fifty cents, we are not allowed to charge more.*

Q. You have charged more in some cases? A. We charge fifty cents for every ticket we handle.

Q. What you have said as to the method of doing business is practically the same in all cases? A. Yes, sir.

Q. Are there cases when you do charge more than fifty cents? A. Yes, sir.

Q. Explain? A. If a customer insists upon two tickets or four tickets for a certain attraction and we have not got them, and the customer requests or suggests that we go out and purchase them outside, we do that, and in that case we pay the market price and still add fifty cents for our service" (Record, p. 9, fols. 16, 17).

"Q. About how many would you buy at the market price? A. Sometimes ten or twenty a day and sometimes none.

Q. About how many out of the 300,000 seats that you sell? A. I don't think it would not exceed five or ten thousand. We have a very short season, it only extends six months" (Record, p. 16, fol. 28).

It is clear from this testimony that a profit of 50 cents on a ticket was adequate so far as this house was concerned and the members were enabled to make "a good comfortable living."

The witness testified as follows in regard to the business of "McBride":

"Q. McBride is one of the largest? A. Yes, sir.

Q. And he sells approximately how many tickets a year? Five hundred thousand tickets a year? A. I think so.

Q. *And his rate is fifty cents over the*

amount printed on the ticket? A. Yes, sir.

Q. He has not gone into bankruptcy? A. Not that I heard of.

Q. He has been doing business for forty-five years? A. Yes, sir" (Record, pp. 14, 15, fol. 25).

The affidavit of John McBride sworn to the 21st of January, 1919, offered by the People and received in evidence without objection (Record, p. 16, fol. 28; pp. 24, 25, fols. 41, 42), stated:

"that the said business was established by deponent's father, Thomas J. McBride, 45 years ago, and has continued in business without interruption since its establishment; and that deponent has been associated in this business with his father from 1894 to date, a period of 25 years; that during this entire period of time it has been the policy of the McBride Company to only charge their patrons 50 cents higher than the box office prices on each ticket sold, except on occasions when the McBride Agency did not have the tickets desired, in which case customers were warned if they insisted on purchasing through the McBride Agency particular tickets it would be necessary to buy them in the open market or some other speculator, and that they would be charged 50 cents over the price paid to the other speculator or in the open market. Ninety-eight per cent. of the business has been conducted on a 50 cent increase over box office rates basis, the exception in the over-charge of prices above mentioned occurring very seldom. The deponent's company sells approximately 500,000 tickets per year. *The policy of charging a brokerage fee of 50 cents on each ticket sold by deponent's company has resulted in the growth and development of a profitable business enterprise and which enterprise is now thriving, and the volume of business increasing from year to year.*"

As to this matter, the Court below stated:

"The sole question which we must still consider is whether the regulation of the Legislature is reasonable. The statute does not forbid the ticket brokers from exercising their lawful business nor from rendering the same service to the public as they have previously rendered, and in this respect the statute differs from the statutes or ordinances condemned by the courts of Illinois and California in the cases cited above. It permits the brokers to charge an advance of 50 cents above the price charged by the managers of the theatre, and there is some evidence from which it might be inferred that this charge would afford reasonable compensation for the services rendered by them, and that it represents the usual profit made by those conducting the business on a considerable scale."

People v. Weller, 237 N. Y. 316, 330.

In *Opinion of Justices to Senate* (247 Mass. 589, 598), it is said:

"In view of the prices commonly charged for tickets of admission to theaters and places of amusement, we are of opinion that a limitation of additional price on resale to a sum not exceeding 50 cents on each ticket cannot be pronounced unreasonable."

It is true that David Marks, the witness for the defendant, testified that the ticket sellers who did not have a large business had to charge an excess of more than 50 cents on a ticket to "exist" (Record, p. 12, fol. 21).

It does not follow because some persons who have invested their money in the business of ticket selling can not carry on their business at

a profit unless they charged an excess price of more than 50 cents on a ticket, that therefore the rate established by the statute is unfair and unreasonable. Their methods of carrying on business may be unwise, they may have been extravagant. See

Reagan v. Farmers' Loan & Trust Co.,
154 U. S. 362, 412;

Ratcliff v. Wichita Union Stockyards Co.,
74 Kans. 1; 86 Pacific Reporter 150,
154.

In *State v. Hall*, (190 Northwestern Reporter 457, 458 [Wis.]), it is stated:

"The constitutionality of laws does not depend upon such fortuitous circumstances. It is a well established principle of law that the constitutionality of an act cannot be tested by the evidence in the particular case."

See also

City of St. Louis v. Liessing, 89 Southwestern Reporter 611, 613, 614 (Mo.).

Therefore, as in the case at bar there is a "real, substantial evil of public interest to be guarded against" and there is a "reasonable relation between the evil and the purported cure or prevention offered by the statute" the whole statute, it is submitted, is constitutional. (See *People v. Charles Schweinler Press*, 214 N. Y. 395, 407.)

In *People v. Charles Schweinler Press*, *supra*, at page 406, the Court said:

"The legislature was justified in preventing any such evils as those which were out-

lined, both real and fairly to be anticipated, by any legislation which reasonably tended to prevent them, and it had a wide discretion in formulating the means which it would adopt to this end."

POINT III.

The price restriction provision of the statute is not so essentially a part of it that the validity of the statute must necessarily depend upon the validity of that provision.

There is nothing to indicate that the Legislature would not have passed the statute or would not have undertaken to require persons engaged in the business of selling theatre tickets to obtain licenses unless there was coupled with it a provision restricting the price of tickets. The part of the statute restricting the price which the broker may charge for a ticket is clearly separable from the general licensing feature. Hence, the validity or invalidity of the statute as a whole is not to be determined by determining the validity or invalidity of the price restriction provision.

In 6 R. C. L., "Constitutional Law", §121, it is said:

"It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected; but where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole

statute falls. If after eliminating the invalid portions, the remaining provisions are sufficient to be operative and accomplish their proper purpose, it does not necessarily follow that the whole act is void. The constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. In determining the question whether the parts of a statute are severable within the meaning of this principle, the court acts by inspection of the statute. The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall. It has also been recognized that a preamble of an act may be severed from the rest of a statute. In view of the established custom of judicial tribunals of avoiding the determination of questions as to the constitutionality of statutes except when necessary in deciding litigated cases, the courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional, where they are of the opinion that if such provision is in fact invalid it may be severed from the remaining provisions of a statute, the validity of which alone is necessarily before the court."

In *Ashley v. Justices of Superior Court* (228 Mass. 63, 81), Rugg, C. J., said:

"It is a well settled principle of constitutional law that one part of a statute may be contrary to the Constitution, while the rest may stand as valid, provided the two parts are distinct and in their nature separable the one from the other and are not so interwoven and mutually dependent as to require the belief that the Legislature would not have enacted the one without the other."

See also:

Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 270, 278.

In *State v. Gordon*, (268 Mo. 713; 188 Southwestern 160, 164), the Court announced the rule as follows:

"That, if, after cutting out and throwing away the bad parts of a statute enough remains which is good to clearly show the legislative intent and to furnish sufficient details of a working plan by which that intention may be made effectual, then we ought not, as a matter of law, to declare the whole statute bad."

In *Brazee v. Mich.* 241 U. S. 340, 344), a statute regulating employment agencies and requiring those engaged in conducting such a business to obtain a license and pay a fee therefor was sustained. The Act contained provisions respecting the fees that might be lawfully charged. Respecting this provision, the Court said:

"Provisions of §5 in respect of fees to be demanded or retained are severable from other portions of the act and, we think, might be eliminated without destroying it."

Authorities to this effect might be multiplied indefinitely. The principle is elementary. It is only when the bad part is so deeply woven into the whole scheme and purpose of the law that the whole law must fall with it. It must appear that without the alleged bad part the law would not have been enacted at all to justify an annulment of the whole law because of the bad part (*Pollock v. Farmers L. & T. Co.*, 158 U. S. 601, 635-637),

If, after eliminating the alleged bad part, a purpose can be discerned in the rest of the law which goes to carry out a public end the invalid feature may be rejected and the rest of the law permitted to remain.

If, in the case at bar, the statute had consisted of two parts entirely separate and distinct, one providing for licensing ticket sellers and the other providing for restriction as to price of tickets, there would be no question but that the statute might be upheld as to the one part and might fall as to the other. (*Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 278; *Dorchy v. State of Kansas*, 264 U. S. 286). In the present statute the price restriction part may be cut out and yet there will remain sufficient provisions for a working plan to license ticket sellers. In §169 the part as to excess of price might be eliminated and yet enough would remain to provide for giving a bond. In §170 the provision as to excess of price might be rejected and yet other grounds would remain for revocation of licenses.

In the case of *Hauser v. North British and Mercantile Ins. Co.* (152 App. Div. 91, aff'd 206 N. Y. 455) the condition held to be invalid was "the only condition imposed" while in the above sections the restriction as to price is not the only provision contained therein.

In *Loeb v. Columbia Township Trustees* (179 U. S. 472, 490), the court said:

"As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the

other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other.”

But assuming that the price restriction feature is so interwoven in these two sections (169 and 170) as to make it impossible to cut out this restriction without destroying the sections yet a workable plan would remain. Section 168 of the statute may stand complete in itself as to the granting of a license and at common law it would be implied that the officer or board that had power to grant a license would have power also to revoke it (*People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 187, 190, 197). Therefore it is evident that the two features “are not so interwoven and mutually dependent as to require the belief that the Legislature would not have enacted the one without the other” (See *Ashley v. Justices of Superior Court*, 228 Mass. 63, 81; *Brazee v. Michigan*, 241 U. S. 340, 344).

In *People ex rel. Alpha P. C. C. Co. v. Knapp*, (230 N. Y. 48, 60), the language of the Court was:

“In this state, we have gone far in subdividing statutes, and sustaining them so far as valid (*Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 278, and cases there cited; *People v. Beakes Dairy Co.*, 222 N. Y. 416,

432; *People ex rel. Penn. Gas Co. v. Saxe*, 229 N. Y. 446). The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. * * * The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether."

Counsel for the appellant cites *Lemke v. Farmers Grain Co.*, 258 U. S. 50. At page 60 of that opinion the Court says:

"It is insisted that the price fixing feature of the statute may be ignored, and its other regulatory features of inspection and grading sustained if not contrary to valid federal regulations of the same subject. But the features of this act, clearly regulatory of interstate commerce, are essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it may be sold. It is apparent that without these sections the state legislature would not have passed the act. Without their enforcement the plan and scope of the act fails of accomplishing its manifest purpose. We have no authority to eliminate an essential feature of the law for the purpose of saving the constitutionality of parts of it. *International Textbook Co. v. Pigg*, 217 U. S. 91, 113, and cases cited."

It will be observed that the Court says that in this case it is apparent that without the unconstitutional provisions "the state legislature would not have passed the act." In the case at

bar the legislature expressly declares its intention. It states that although it be determined that any section is unconstitutional "*such determination shall not affect the validity or effect of the remaining provisions of this article*" (§174).

In the case at bar there is a very clear indication of the intent of the legislature that is lacking in most if not all the cases heretofore cited. The legislature has very positively declared its intention that even if the price restriction provision is invalid nevertheless the rest of the statute should be held constitutional. The statute contains the following provision:

"§174. Constitutionality of article. In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of this article."

In Ruling Case Law (Vol. 6, §123) it is stated:

"Occasionally the legislature expressly states its will that the valid provisions of a statute shall be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is generally carried out by the courts."

In *State v. Clausen* (65 Wash. 156; 117 Pacific Reporter 1101, 1114), the Court in construing such a provision stated:

"It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the Legislature intended the act

to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the Legislature so to provide. Anything it could have eliminated itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination."

See:

People ex rel. Stafford v. Travis, 231 N. Y. 339, 348, 349;

Dorchy v. State of Kansas, 264 U. S. 286.

Section 22 of the "Lever Act" (Act of Congress, Aug. 10, 1917, ch. 53) contains a provision similar to section 174, *supra*, in that it provides that if part of the statute be adjudged invalid such determination shall not affect the rest of the statute.

In two recent cases this section has been considered.

In *Baird v. United States* (279 Fed. Rep. 509, 511), the Circuit Court of Appeals said:

"While the price-fixing provision of section 4 of the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §3115 $\frac{1}{8}$ ff) has been declared unconstitutional (*United States v. Cohen Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045), such declaration does not affect the validity of section 15 (Comp. St. §3115 $\frac{1}{8}$ l). See in this connection the express provision in section 22 of the act (Comp. St., §3115 $\frac{1}{8}$ oo)."

In *Lajoie v. Milliken* (242 Mass. 508; 136 N. E. Rep. 419, 424), Chief Justice Rugg said in discussing the "Lever Act":

"There seems to us to be nothing at variance with this conclusion in *United States v. Cohen Grocery Store Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045. The part of the Lever Act there held violative of the guaranties of the Fifth and Sixth Amendments to the United States Constitution, are separable from the provisions here invoked. *Ashley v. Three Justices of the Superior Court*, 228 Mass. 63, 81, 116 N. E. 961, 8 A. L. R. 1463, and cases there collected; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 395, 14 Sup. Ct. 1047, 38 L. Ed. 1014. Moreover, it was the intent of Congress as declared by section 22 of the act (section 3115 $\frac{1}{8}$ °°) that no unconstitutional provisions therein should taint in any particular other parts not in themselves violative of constitutional guaranties."

Counsel for appellant cites *Hill v. Wallace*, 259 U. S. 44.

A suit was brought attacking the validity of the Act of Congress known as the "Future Trading Act," approved August 24, 1921. The act imposed a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery, with certain exceptions. The Court held that the act could not be sustained as an exercise of the taxing power of Congress. It was then sought to sustain the act under the power of Congress to regulate interstate commerce. But as there was no reference in the act to interstate commerce the Court held it had no power to insert limitations not contained in the act.

At page 68 the Court said:

"We come to the question then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the State. *House v. Mayes*, 219 U. S. 270; *Brodnax v. Missouri*, 219 U. S. 285. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words '*interstate commerce*' are not to be found in any part of the act from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."

It was sought to uphold the Act of Congress on the ground that it contained a section which directed, if a provision of the act was invalid, the validity of the remainder should not be affected thereby.

At page 70, the Court said:

“Section 11 of this act directs that ‘if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.’

Section 4 with its penalty to secure compliance with the regulations of Boards of Trade is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States v. Reese*, 92 U. S. 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):

‘We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.’

Trade-Mark Cases, 100 U. S. 82; *Butts v. Merchants & Miners Transportation Co.*, 230 U. S. 126.

To be sure in the cases cited there was no saving provision like §11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.

There are sections of the act to which under §11 the reasons for our conclusion as to §4 and the interwoven regulations do not apply. Such is §9 authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3, too, would not seem to be affected by our conclusion."

In the case at bar assuming that the provisions as to restriction as to excess of price are unconstitutional, they can be cut out and "enough remains which is good to clearly show the legislative intent and to furnish sufficient details of a working plan by which that intention may be made effectual."

State v. Gordon, 268 Mo. 713; 188 Southwestern Reporter 160, 164.

The proposed effect is "to be attained by striking out or disregarding words" that are in the statute. It is not necessary to amend the statute "by inserting" words "that are not now there."

But in *Hill v. Wallace*, *supra*, the desired effect could only be attained "by inserting limitations it does not contain."

"The proposed effect is not to be attained by striking out or disregarding words that are in the

section, but by inserting those that are not now there."

In the recent case of *Dorchy v. State of Kansas*, 264 U. S. 289, 290, the language of this Court was:

"A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. * * * But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall."

In the case at bar not only inherently unobjectionable provisions can be separated as heretofore indicated, but also it is clear that the legislature "intended" these provisions "to stand."

As cogent evidence of the intention of the Legislature, attention is called to the fact that after it had been held in *People v. Newman*, (109 N. Y. Misc. R. 622), that the provisions of the ordinance as to ticket sellers was unconstitutional the Legislature passed two acts as to the sale of tickets to admission to theatres and places of amusement.

The first act passed in 1921 was vetoed by Governor Miller. In his message vetoing this act the Governor called the attention of the Legislature to the opinion in *People v. Newman* (109 N. Y. Misc. Rep. 622). In 1922 the Legislature passed the present act which was signed by Governor Miller. (See Brief of plaintiff-in-error, pp. 7-9). It is submitted that this legislation shows a determined purpose to restrain the evils of ticket sell-

ing and to regulate the business so far as the Legislature has the constitutional power.

In view of the history of the statute and the command of the last section thereof, how can there be any doubt that the Legislature, if the statute was in part invalid "wished the statute to be enforced with the invalid part excised, or rejected altogether." See:

People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 60.

POINT IV.

The provision as to the penalty incurred for a violation of the statute is constitutional.

The plaintiff in error contends that: (1) "The taking out of a license and the giving of a bond precludes the licensee from subsequently attacking the constitutionality of the statute requiring such license and bond" (Brief of Plaintiff-in-Error, p. 76); and (2) "If the licensing provision of the act standing by itself were constitutional, the defendant can not be charged with a misdemeanor for non-compliance therewith if the price-fixing clauses of the act are invalid and he would be precluded from attacking them, because of his compliance with the licensing provision" (Brief of Plaintiff-in-Error, page 82). Therefore it is claimed that the statute is unconstitutional.

To support the first contention *Musco v. United Surety Co.* (196 N. Y. 459), is cited. In that case an action was brought to recover on a bond ex-

executed by one Ferrara as principal and the appellant as surety pursuant to the provisions of a statute. Appellant contended that said bond was unconstitutional. The Court said the right to question the constitutionality of the law had been waived. At page 465, the Court stated:

“The appellant and its principal have waived any question concerning the constitutionality of the act in question. That act in effect prohibited appellant’s principal from carrying on the business of receiving deposits unless he should execute an undertaking as therein provided. Conversely, in effect, it authorized him to conduct such business if he should execute such a bond. He very well may have concluded that it would be to his advantage in the conduct of the business to give such an undertaking, whether he could be compelled so to do or not, and he executed one. Having done this and respondent’s assignors having made deposits with him, as we must assume, on the faith of such undertaking, neither he nor his surety can now raise the question of constitutionality, for it is well settled that an individual may waive even constitutional provisions for his benefit when no question of public policy or public morals is involved.”

It is submitted that, as the rights of innocent parties had intervened, the doctrine of estoppel would preclude the appellant from setting up the unconstitutionality of the bond. Further the Court held the bond was not executed under duress.

It is submitted that, if the defendant in the case at bar had paid the license fee under protest in order to avoid being prosecuted under the stat-

ute, he could have subsequently recovered the money as being paid under duress, and in such an action the constitutionality of the statute could have been passed upon and he would not have been precluded "from subsequently attacking the constitutionality of the statute requiring such license and bond."

Union Pacific R. R. Co. v. Pub. Service Comm., 248 U. S. 67;

Chicago & E. I. Ry. Co. v. Miller, 309 Ill. 257; 140 Northeastern Reporter 823;

Wheeler v. Plumas County, 149 Cal. 782; 87 Pacific Reporter 802, 804, 805;

Amer. Coal M. Co. v. Special C. and F. Com'n., 268 Fed. Rep. 563, 565;

Woodward on Quasi Contracts, §238.

In *Union Pacific R. R. Co. v. Pub. Service Comm.*, *supra*, a State exacted an unconstitutional fee for a certificate of authority to issue railroad bonds, under statutes threatening heavy penalties and purporting to invalidate the bonds, and so rendering them unmarketable, if the certificates were not obtained, it was held that application for and acceptance of the certificate, with payment under protest, were made under duress.

At page 70 the Court said:

"Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U. S. 280."

In *Chicago & E. I. Ry. Co. v. Miller, supra*, (Decided June 20, 1923. Rehearing Denied Oct. 4, 1923), a railroad desiring to issue stock in compliance with a statute secured permission to do so from the proper authority and paid a fee required to be paid, it was held that it was not thereafter precluded from asserting the invalidity of the statute and demanding a return of the fee paid.

At pages 824 and 825 the Court said:

“Where a person voluntarily accepts the benefits of a statute, he will, as a general rule, thereafter be precluded from challenging its validity, if no question of public policy or public morals is involved. *Grand Rapids & Indiana Railway Co. v. Osborn*, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; *Musco v. United Surety Co.*, 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851. Before there can be an estoppel, the acceptance of the benefits of the statute must be voluntary. So where money is paid under pressure of severe statutory penalties or disastrous effect to business, it is held that the payment is involuntary and that the money may be recovered. *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510; *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236; *Swift & Courtney & Beecher Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341. It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. It is true that appellee chose to comply with the plain provisions of the Public Utilities Act rather than suffer the losses certain to follow in an effort to market the stock and bonds without the approval of the Commerce Commission, but this does not make its act voluntary. Con-

duct under duress always involves a choice, but this court has held that the making of a choice under such circumstances does not estop the person acting under duress from later asserting his rights. *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Chicago & Alton Railroad Co. v. Chicago, Vermilion & Wilmington Coal Co.*, 79 Ill. 121; *Pemberton v. Williams*, 87 Ill. 15. In *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, the company brought an action to recover a capital stock tax paid under protest. In disposing of the point the court said:

'In this case the law, besides giving an action of debt to the state, provides that every corporation that fails to pay the tax shall forfeit its right to do business within the state until the tax is paid, and also shall pay a penalty of 10 per cent., for every six months or fractional part of six months of default after May 1 of each year. It may be that the forfeiture of the right to do business would not be authoritatively established, except by a quo warranto provided for in a following section; but before or without the proceeding the effect of the forfeiture clause upon the plaintiff's subsequent contracts and business might be serious. * * * and in any event the penalty would go on accruing during all the time that might be spent before the validity of the defense could be adjudged. As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of opinion that the payment was made under duress.'

There seems to us to be no valid distinction between the case at bar and *Union Pacific*

Railroad Co. v. Public Service Com. of Missouri, 248 U. S. 67, 39 Sup. Ct. 24, 63 L. Ed. 131. In that case, as in this, the railroad company made application to the state commission for authority to issue its bonds for the sole purpose of making them marketable. In allowing recovery of the taxes paid the court said:

'The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.'

The chancellor properly ordered the tax assessed refunded, so the decree of the circuit court is affirmed."

It will be observed that the Illinois Supreme Court in the above case cites the case of *Musco v. United Surety Co.*, *supra*, and distinguishes it.

But, assuming that defendant would have waived his right to question the constitutionality of the statute by giving a bond and taking out a license, it does not follow that therefore the statute is unconstitutional.

If such were the law every statute that required one to give a bond and to take out a license before he could begin a new business or continue an old business and, in default thereof imposed penalties, would be illegal.

The plaintiff-in-error to support the doctrine that, by giving a bond and taking out a license, he would waive his right to object to the constitutionality of the statute relies, as stated above, upon *Musco v. United Surety Co., supra*.

In that case a statute (Chapter 185, Laws 1907), required that persons engaged in the business of taking deposits of money to transmit to foreign countries before entering into said business or before continuing said business should give a bond for \$15,000, to the People of the State of New York "conditioned for the faithful holding and transmission of any money, or the equivalent thereof, which shall be delivered to it or them for transmission to a foreign country." The bond was not to be accepted unless approved by the comptroller and upon approval was to be filed in his office. The statute further provided as to the penalty for a violation:

"§5. Any corporation, firm or person entering into or continuing in the business aforesaid, contrary to the provisions of this act, shall be guilty of a misdemeanor."

An action was brought to recover on a bond given pursuant to this statute. It was insisted by the appellant that this statute was unconstitutional on certain grounds; but the Court not only stated that the appellant had waived the right to make such an objection, but also said that the objection that the statute was unconstitutional could not be sustained. At page 465 the Court said:

"But, as stated, if the constitutionality of the statute in question were open to attack by appellant on the grounds stated by it, such attack could not succeed."

A comparison of the statute (Ch. 185, Laws 1907), construed in *Musco v. United Surety Co.*, *supra*, with the statute which is to be construed in the case at bar (Ch. 590, Laws 1922) shows that the provisions are similar. In particular, it will be observed that in each statute the only penalty imposed upon the person engaging in or continuing the business in violation of the statute is that he "shall be guilty of a misdemeanor."

In neither statute was there an attempt to intimidate a contest of legality by the severity of the penalties. In neither would agents and servants employed in the business be liable for immense fines. Therefore, it is submitted, if the statute in *Musco v. United Surety Co.*, *supra*, was not unconstitutional as debarring the appellant from questioning the validity of its provisions, the statute in the case at bar is not unconstitutional.

Counsel for plaintiff-in-error cites to support his second contention, *Ex parte Young*, 209 U. S. 123.

In that case it was held that a state railroad rate statute which imposed such excessive penalties that parties affected were deterred from testing its validity in the courts, denied the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed. A comparison of the penal provision of the statute in the case at bar with the penalties imposed for a violation of the statute involved in *Ex parte Young*, *supra*, shows a radical difference as to the penal provisions contained in the

two statutes. In *Ex parte Young, supra*, at pages 144-146, the Court says:

“Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employés, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws although such obedience might also result in the end (though by a slower process) in such confiscation.

.

Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. Disobedience to the passenger rate act renders the party guilty of a felony and subject

to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment. The sale of each ticket above the price permitted by the act would be a violation thereof. It would be difficult, if not impossible for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the Commission. The company, in order to test the validity of the acts, must find some agent or employé to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employés could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company."

In the case at bar, the validity of the act did not depend "upon the existence of a fact which can be determined only after investigation of a very complicated and technical character" (*Ex parte Young, supra*, page 148). The ticket seller is not subjected to "enormous penalties" (*Ex parte Young, supra*, page 145). The only penalty prescribed for engaging in the business without first having procured a license and filing a bond is that the ticket seller will be guilty of a misdemeanor (Section 173). On the other hand, if he takes out a license and files a bond and then

violates the statute, he can only be held in the penal sum of one thousand dollars (Section 169), in addition to being guilty of a misdemeanor.

Ex parte Young, supra, has been distinguished in *Rast v. Van Deman & Lewis*, 240 U. S. 342.

In the latter case there was involved the validity of a statute of the State of Florida imposing special license taxes upon merchants using profit-sharing coupons and trading stamps. The statute provided that any person "violating any of the provisions of this section whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand (\$1,000) dollars or by imprisonment in the county jail not exceeding six months."

The Court refused to apply to the facts in this case the doctrine of *Ex parte Young* that the severity of the penalties was such as to intimidate a contest as to the legality of the statute, and said at page 368:

"The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young*, 209 U. S. 123, is not justified."

It is submitted that the provision as to a penalty in the statute involved in the case at bar brings it within the decision of *Rast v. Van Deman & Lewis, supra*, and that the doctrine of *Ex parte Young, supra*, as to the severity of penalties does not apply.

POINT V.

The passage of the statute was a proper exercise of the police power and (1) did not deprive the defendant of liberty or property without due process of law, nor (2) was there denied to the defendant the equal protection of the law.

In *People ex rel. Durham R. Corp. v. La Petra* (230 N. Y. 429, 442, 443), the police power is defined as follows:

“The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.”

The language of the Court in *Sligh v. Kirkwood* (237 U. S. 52, 59), is:

“Whether it is a valid exercise of the police power is a question in the case, and that power we have defined as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general

prosperity * * * And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' "

a. Assuming that the business of a theatre ticket broker is not one clothed with a public interest, that the business does not fall within one of the three classes enumerated in *Charles Wolff Packing Company v. Industrial Relations of the State of Kansas* (262 U. S. 522, 535, 536).

Assuming further that the criticism of the statute by counsel for the plaintiff-in-error is not without foundation when he said:

"On the theory of this legislation it would be equally permissible to limit the compensation of lawyers and physicians, of journalists and accountants, of clerks and bookkeepers, the wages of shoemakers and tailors, of carpenters and bricklayers, the commissions of factors and brokers and of agents of every imaginable variety" (at pp. 22-23).

Nevertheless, the evidence is clear and convincing that evils flow from the present system of selling theatre tickets. *People v. Thompson*, 238 Ill. 87; 119 Northeastern Reporter, 41, 45, 46.

In *People v. Newman* (109 N. Y. Misc. Rep. 622, 660), it was admitted by the Court that there was "evil flowing from this business" and that it "should be corrected."

Abuses frequently result from this business and patrons of theatres suffer imposition.

Collister v. Hayman, 183 N. Y. 250, 258.

In the case at bar, the Court of Appeals described the evil as follows:

“The existence of extortion due to present unregulated conditions in the business of reselling tickets of admission to places of public amusement is widely recognized; the abuse is due to acts of the ticket brokers alone or in conjunction with producers, and these acts are calculated to injure large numbers of the public in connection with a business which is at least to some degree affected with a public interest.”

People v. Weller, 237 N. Y. 316, 331.

The Appellate Division said in regard to the abuses:

“There seems to be ample evidence that the calling of the ticket speculator has been associated with certain abuses, and all efforts to remedy these, we are told have been in vain. • • • Further evidence of abuses which flow from the business of ticket speculating is furnished by the legislation that has been passed in a number of States, aimed at improving the conditions surrounding the sale and distribution of tickets.”

People v. Weller, 207 N. Y. App. Div. 337, 339, 340.

See also:

Opinion of Justices to Senate, 247 Mass. 589, 596.

The legislature of New York has declared that “the price of or charge for admission to theatres” is “subject to the supervision of the state for the purpose of safeguarding the public

against fraud, extortion, exorbitant rates and similar abuses."

Further, in the case at bar the testimony of a witness for the defendant clearly indicated the favorable conditions which enabled the ticket brokers to practice extortion and to establish a monopoly.

"Q. If these people did not get these tickets from you in this way, how would they get them, they would have to go to the box office? A. No, sir. *The best they could get for any show is the fifteenth or sixteenth row*" (Record, p. 10, fol. 19).

"Q. There are thirty offices where you can buy tickets from ticket brokers? A. Yes, sir.

"Q. And they are controlled by how many people? A. Probably a dozen or fifteen" (Record, p. 14, fol. 25).

Therefore, if "abuses" have existed for a long time, if the "existence of extortion * * * is widely recognized," if there is "evil flowing from this business" which "should be corrected," is it not a legitimate exercise of the police power for the legislature to adopt a remedy reasonable and appropriate to correct the "evil" the "abuses" and "the extortion" associated with the business of theatre ticket brokers? How can such an exercise of the police power be said to deprive any person of liberty or property without due process of law or deny to any person the equal protection of the law?

The answer of the courts is that there has been no interference with the Fourteenth Amendment in such a case.

The following classic statement is given by Judge Field in *Barbier v. Connolly* (113 U. S. 27, 31, 32):

“The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no difference or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.*” (Italics ours.)

The language of the Court in *Powell v. Pennsylvania* (127 U. S. 678, 683) was:

“It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the Fourteenth Amendment to the Constitution of the United States.

“It is scarcely necessary to say that *if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that Amendment*; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States.” (Italics ours.)

In *People v. Budd* (117 N. Y. 1; affd. 143 U. S. 517) the main question was whether the legislation fixing the maximum charge for elevating grain was valid and constitutional. At page 7 the Court stated:

“This court has recently, in several notable instances, vindicated the rights of individuals against unjust and arbitrary legislation, restraining freedom of action or imposing conditions upon private business, not warranted by the Constitution. * * * But the very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all.

This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all."

In *Terrace v. Thompson* (263 U. S. 197), the Court in discussing the Anti-Alien Land Law of the State of Washington, at pages 216, 217, said:

"The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their right to lease and dispose of their land for lawful purposes and the alien resident *in his right to earn a living by following ordinary occupations of the community, but it does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution.*

• • • And in the exercise of such powers the State *has wide discretion* in determining its own public policy and *what measures are necessary for its own protection* and properly to promote the safety, peace and good order of its people." (The italics ours.)

b. As the prevention of the "extortion" and the "abuses" connected with the business of theatre ticket brokers came within the scope of the police power and the situation presented a reasonable necessity for the imposition of restraint, the next question presented is whether the remedies adopted by the legislature to restrain these evils were appropriate and reasonably necessary to accomplish the purpose designed.

An examination of the various attempts to prevent the evils of ticket selling clearly indicates that the present act was not a hurried piece of legislation.

It is obvious from a reading of the statute that it was only passed after a deliberate consideration of the evils to be checked and after careful selection of a constitutional remedy, to correct present abuses.

In particular, sections 167 and 174 of the act manifest a purpose on the part of the Legislature through the exercise of the police power—so far as possible within constitutional limitations—to protect the “public against fraud, extortion, exorbitant rates and similar abuses” connected with the business of ticket selling.

In a recent case in Wisconsin, the Court after a consideration of a number of cases in that state succinctly stated the Constitutional limitations upon the exercise of the police power as follows:

“Those cases established the principle that whether a given situation presents a legitimate field for the exercise of the police powers placing restraints upon the use of property or upon personal conduct depends upon whether the situation presents a reasonable necessity for the imposition of restraint in order to promote the public welfare, and whether the means adopted bear a reasonable relation to the end sought to be accomplished.”

State v. Harper, 196 Northwestern Reporter 451, 453 [Wis].

The test as to whether a statute can be upheld as a valid exercise of the police power is expressed as follows in *Purity Extract Co. v. Lynch* (226 U. S. 192, 204):

“The inquiry must be whether considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat.”

The language of the Court in *People v. Charles Schweinler Press* (214 N. Y. 395, 407) was:

“The legislature was justified in preventing any such evils as those which were outlined, both real and fairly to be anticipated, by any legislation which reasonably tended to prevent them, and it had a wide discretion in formulating the means which it would adopt to these means.”

In the *German Alliance Ins. Co. v. Kansas* (233 U. S. 389, 418), the Court said:

“A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise.”

In *Lawton v. Steele* (152 U. S. 133, 137) the following tests are given:

“To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference;

and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

In Point I of this brief, it is submitted, ample authority is given to uphold the validity of the provision requiring ticket sellers to obtain a license. Likewise, it is submitted that the price restriction feature is valid under the police power.

The chief evil associated with the business of theatre ticket brokers seems to be "extortion", "extortionate prices."

The Court below states:

"Without unnecessarily multiplying quotations from opinions of the courts, we may point out that in *Collister v. Hayman* (183 N. Y. 250, 254) this court stated: 'A ticket speculator is one who sells at an advance over the price charged by the management. Speculation of this kind frequently leads to abuse, especially when the theatre is full and but few tickets are left, so that extortionate prices may be exacted.' "

People v. Weller, 237 N. Y. 316, 327.

At pages 327 and 328 the language of the Court is:

"The same respect for individual liberty, which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, *will leave the patrons of the theatre* 'to the mercy of speculators' " (Italics ours).

See also,

Opinion of Justices to Senate, 247 Mass.
589, 595-596.

When the public is subjected to "extortionate prices" what remedy is more appropriate than a price restriction?

Does not such a legislative provision reasonably tend to prevent the evils suffered by the public?

People v. Charles Schweinler Press, 214
N. Y. 395, 406.

Do not the "means adopted bear a reasonable relation to the end sought to be accomplished"?

State v. Harper, 196 Northwestern Re-
porter 451, 453 [Wis.].

Is there any doubt "that the means are reasonably necessary for the accomplishment of the purpose"?

Lawton v. Steele, 152 U. S. 133, 137.

For this recognized evil has any one been able to suggest an effective remedy other than a restriction of the price?

Why is there "extortion" and "extortionate prices" in the conduct of the business by theatre ticket agents? Why are there conditions which, unless controlled, will leave the patrons of the theatres "to the mercy of speculators"? Is it not because there is a virtual monopoly in the sale of all desirable tickets which are not back

of the "fifteenth or sixteenth row" owing to the business being controlled by "Probably a dozen or fifteen?"

The existence of a virtual monopoly gives the legislature power to regulate rates (*People v. Budd*, 117 N. Y. 1, 26, 27; *affd.* 143 U. S. 517; *People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. 429, 445).

In *Spring Valley Water Works v. Schottler* (110 U. S. 347, 354), it was said:

"That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly only of the sale, we do not doubt."

That the price restriction remedy is a new one is no reason for claiming its invalidity.

In *People ex rel. Durham R. Corp. v. La Fetra* (230 N. Y. 429, 446), it is stated:

"Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent may make necessary or beneficial the right of public regulation."

See, also, *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 409; *Noble State Bank v. Haskell*, 219 U. S. 104.

The statute not only does not deprive the defendant of liberty and property without due process of law, but further it does not deny him equal protection of the law as compared with "clerks and bookkeepers," "shoemakers and tailors," "carpenters and bricklayers". In the case of the theatre ticket sellers, there were "ex-

tortion" and "extortionate prices", and unless the price could be controlled patrons would be left "to the mercy of speculators". See *Collister v. Hayman*, 183 N. Y. 250, 254. These abuses could not be prevented by competition, because as to the most desirable seats there was a practical monopoly.

As to the other classes mentioned such as the "shoemakers and tailors", there was no monopoly, the price was fixed "over the counters", "by what Adam Smith calls the higgling of the market" (See *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 416).

By reason of "extortion", "extortionate prices" and a virtual monopoly, the legislature was justified in legislating as to theatre ticket sellers as a separate class. There was no unconstitutional discrimination. The statute "secures equal protection to all in the enjoyment of their rights under like circumstances" (See *Terrace v. Thompson*, 263 U. S. 197, 218).

The rules to determine whether there has been an arbitrary classification and consequently a denial of equal protection of the laws are stated as follows in *Lindsley v. Natural Carbonic Gas Co.* (220 U. S. 61, 78, 79):

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with

mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Applying these rules to the facts in the case at bar, it is evident that there was a "reasonable basis" for the statute. There was a statement of facts existing which sustained the classification. Lastly, the plaintiff-in-error as to this classification was under the "burden of showing that it does not rest upon any reasonable basis."

The statute cannot be successfully attacked because "some cases which might have been included are omitted, for police legislation may rest on narrow distinctions."

People v. Charles Schweinler Press, 214
N. Y. 395, 407.

See also

German Alliance Ins. Co. v. Kansas, 233
U. S. 389, 418.

It is apparent from the evidence in this case that the legislature might have been justified in also protecting the public against the acts of the producing managers. But the statute "does not prohibit the producing manager from charging the public all that the public will pay, but leaves the regulation of price between producer and con-

sumer to the free play of supply and demand." See *People v. Weller*, 237 N. Y. 316, 330.

Whether the legislature should have attempted to cure all the evils that have grown out of the sale of theatre tickets, or only endeavor to check these evils where they affected the public in the greater degree, was for the legislature alone to decide. In the language of *German Alliance Ins. Co. v. Kansas* (233 U. S. 389, 418):

"Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

This doctrine is expressed in *Keokee Coke Co. v. Taylor* (234 U. S. 224, 227) as follows:

"It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the Court can see. That is for the legislature to judge unless the case is very clear."

In the case at bar, a classification was made by the legislature to meet an existing condition, not an imaginary or improbable one. The classification has been upheld by the Court of Appeals as proper to meet such conditions. Likewise, it is submitted the classification should be sustained by this court as there is no cogent reason that

requires its extension to include "others whom it leaves untouched."

Williams v. Arkansas, 217 U. S. 79, 90.

c. *The police power expands to meet new conditions.*

One of the chief attributes of the police power is that it is flexible and adaptive, that it expands to meet new conditions and keeps pace with new developments (*Enbank v. Richmond*, 226 U. S. 137, 142; *Hadacheck v. Los Angeles*, 239 U. S. 394, 410).

In *Holden v. Hardy* (169 U. S. 366), in deciding that a statute of Utah providing that the "period of employment of workingmen in all underground mines or workings shall be eight hours per day" was a valid exercise of the police power of the State, the Court said, at page 385, that "in passing upon the validity of state legislation under that amendment [the Fourteenth], this Court has not failed to recognize the fact that the law is, to a certain extent, *a progressive science*" (Italics ours). See also *Noble State Bank v. Haskell*, 219 U. S. 104, 110.

The rights of the community are the supreme consideration—to which those of the individual must yield. As said by the Court in *Union Dry Goods Co. v. Georgia P. S. Corp.* (248 U. S. 372, 375):

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

We find many exercises of this power in recent times which formerly might have been considered doubtful. Thus, we find that it has been held to authorize restrictions on the hours of labor (*Muller v. Oregon*, 208 U. S. 412; *People v. Schweinler Press*, 214 N. Y. 395, overruling, it seems, *People v. Williams*, 189 N. Y. 131; *Ritchie v. Wayman*, 244 Ill. 509; *State v. Bunting*, 71 Oregon 259; aff'd. 243 U. S. 426; *Hawley v. Walker*, 232 U. S. 718).

A striking instance of this broadening of the police power and a departure from earlier decisions is the case of *Klein v. Maravelas* (219 N. Y. 383, 384-386) where the Court, construing the sales in bulk law said the prior case of *Wright v. Hart* (182 N. Y. 330) was "wrong". The latter case had been decided only about eleven years before *Klein v. Maravelas*, *supra*.

In *Klein v. Maravelas*, at pages 384-386, the Court said:

"This case makes it necessary for us to say whether the so-called sales in bulk law is a constitutional enactment (Personal Property Law, §44, L. 1914, ch. 507; Cons. Laws, ch. 41). A very similar law was enacted in 1904 (L. 1904, ch. 569). In *Wright v. Hart* [1905], 182 N. Y. 330, we held it to be unconstitutional. We said that it violated the federal constitution in denying to merchants the equal protection of the laws. We said that it violated both the federal and the state constitution in imposing arbitrary restrictions upon liberty of contract. That decision was reached by a closely divided court. Three judges dissented. There were strong dissenting opinions by Judge VANN and Chief Judge CULLEN.

Since *Wright v. Hart* was decided, the validity of like statutes has been upheld in two cases by the United States Supreme Court (*Lemieux v. Young*, 211 U. S. 489; *Kidd, Dater & Price Co. v. Musselman Grocery Co.*, 217 U. S. 461). Objection to this statute on the ground of conflict with the federal constitution has thus been removed. We have still to determine, however, whether there is any conflict with our state constitution; and that requires us to say whether we shall adhere to our decision in *Wright v. Hart*.

We think it is our duty to hold that the decision in *Wright v. Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright v. Hart*, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (*Wright v. Hart, supra*, at p. 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state." • • •

"In such circumstances we can no longer say, whatever past views may have been, that the prohibitions of this statute are arbitrary and purposeless restrictions upon liberty of contract (*Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 366; *Noble State Bank v. Haskell*, 219 U. S. 104; *Otis v. Parker*, 187 U. S. 606). *The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past* (Italics ours) (*People v. Schweinler Press*, 214 N. Y. 395)."

This flexibility of the police power to meet new conditions whereby new regions are added to its domain, is also illustrated in the expansion of the definition of a public use.

In a recent case in Minnesota it was held that "the establishment of a municipal fuel yard is a public purpose."

Central Lumber Co. v. City of Waseca,
152 Minn. 201; 188 Northwestern 275.

In that case, the Court says:

"Economic and industrial conditions are not stable. Times change. Many municipal activities, the propriety of which is not now questioned, were at one time thought, and rightly enough so, of a private character. The constitutional provision that taxes can be levied only for a public purpose remains; but conditions which go to make a purpose public change."

This tendency is also illustrated in *Shoemaker v. United States* (147 U. S. 282, 297), where Judge Shiras said:

"In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power. • • • It is said in Johnson's Cyclopaedia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air."

d. *To hold that the statute is invalid is to hold that the State is powerless to protect the public against recognized abuses.*

An examination of the various attempts to prevent the evils of ticket selling clearly indicates that the present act was not a hurried piece of legislation.

It is obvious from a reading of the statute that it was only passed after a deliberate consideration of the evils to be checked and after careful selection of a constitutional remedy to correct present abuses.

In particular, sections 167 and 174 of the act manifest a purpose on the part of the Legislature through the exercise of the police power—so far as possible within constitutional limitations—to protect the “public against fraud, extortion, exorbitant rates and similar abuses” connected with the business of ticket selling.

It is submitted that to hold that the statute in the case at bar is unconstitutional is to admit that however injurious the abuses of the business of ticket selling and however righteous may be the indignation of the public at these abuses, the police power of the State cannot deal with the evil.

The evil is not new. As already indicated abuses similar to those described in the case at bar existed in ancient Athens, but the Athenians devised an effective remedy.

See “The Attic Theatre” by A. E. Haigh, at page 330.

Over two thousand years thereafter a like situation exists in this State. Is there no remedy?

Is the Legislature so powerless that it cannot safeguard "the public against fraud, extortion, exorbitant rates and similar abuses"?

"Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

People ex rel. Durham R. Corp. v. La Fetra, 230 N. Y. 429, 443.

IN CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

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April, 1925.



SUPREME COURT OF THE UNITED STATES.

No. 349.—OCTOBER TERM, 1924.

Reuben Weller, Plaintiff in Error, } In Error to the Court of
vs. } Special Sessions of the
The People of the State of New York. } City of New York, State
of New York.

[May 25, 1925.]

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Chapter 590, New York Laws 1922, added eight sections, 167-174, to the General Business Law of the State. They are copied in the margin.* Section 168 directs: "No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held

*§ 167. *Matters of Public Interest.* It is hereby determined and declared that the price of or charge for admission to theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses.

§ 168. *Reselling of Tickets of Admission; Licenses.* No person, firm or corporation shall resell or engage in the business of reselling any tickets of admission or any other evidence of the right of entry to a theatre, place of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held without having first procured a license therefor from the comptroller. Such license shall be granted upon the payment by or on behalf of the applicant of a fee of one hundred dollars and shall be renewed upon the payment of a like fee annually. Such license shall not be transferred or assigned, except by permission of the comptroller. Such license shall run to the first day of January next ensuing the date thereof, unless sooner revoked by the comptroller. Such license shall be granted upon a written application setting forth such information as the comptroller may require in order to enable him to carry into effect the provisions of this article and shall be accompanied by proof satisfactory to the comptroller of the moral character of the applicant.

without having first procured a license therefor from the comptroller." And § 173 declares every violation of the inhibition shall be a misdemeanor.

By an information in the Court of Special Sessions, New York City, the District Attorney accused plaintiff in error of engaging in the business of reselling theatre tickets without the license required by law. The evidence showed he was engaged in that business, and it was conceded he had never taken out a license or complied with Chapter 590. His defense rested upon the claim that the statute is repugnant to the Fourteenth Amendment. The trial court adjudged him guilty and imposed a fine of twenty-five dollars. This was affirmed by the Appellate Division and by the Court of Appeals. 207 App. Div. 337; 237 N. Y. 316. In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to resale prices were invalid.

§ 169. *Bond.* The comptroller shall require the applicant for a license to file with the application therefor a bond in due form to the people of the state of New York in the penal sum of one thousand dollars, with two or more sufficient sureties, who shall be freeholders within the state of New York, conditioned that the obligor will not be guilty of any fraud or extortion and will not exact or receive a price for any such ticket or evidence of the right of entry in excess of the price authorized by this article. The comptroller shall keep books wherein shall be entered in alphabetical order all licenses granted and all bonds received by him as provided for in this article the date of the issuance of such licenses and the filing of such bonds, which record shall be open to public inspection. A suit to recover on the bond required to be filed by the provisions of this article may be brought by the comptroller or on the relation of any party aggrieved in a court of competent jurisdiction, and in the event that the obligor named in such bond has violated any of the conditions of such bond, recovery for the full penal sum of such bond may be had in favor of the people of the state.

§ 170. *Revocation of licenses.* In the event that any licensee shall be guilty of any fraud or misrepresentation or shall charge for any ticket a price in excess of the price authorized by this article or otherwise violate any of the provisions of this article or any other law or local ordinance, the comptroller shall be empowered, on giving ten days' notice by mail to such licensee, and on affording such licensee an opportunity to answer the charges made against him, to revoke the license issued to him.

§ 171. *Supervision of comptroller.* The comptroller shall have the power upon complaint of any citizen or of his own initiative, to investigate the business, business practices and business methods of any such licensee if in the

Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish resale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the State to require such licenses is clear and that we need not determine the validity of the price restrictions.

It is not, and we think it cannot, seriously be urged that the State lacked power to require licenses of those engaging in the business of reselling theatre tickets. The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the State we shall hold this provision severable and valid. *Brazee v. Michigan*, 241 U. S. 340. The statute itself declares (§ 174): "In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article." If § 172, which restricts resale prices were eliminated, a workable plan would still remain. See *Dorchy v. Kansas*, 264 U. S. 286.

The judgment of the court below is affirmed.

opinion of the comptroller such investigation is warranted. Each such licensee shall be obliged, on request of the comptroller, to supply such information as may be required concerning his business, business practices or business methods.

§ 172. *Restriction as to Price.* No licensee shall resell any such ticket or other evidence of the right of entry to any theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are given at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry. Every person, firm or corporation who owns, operates or controls a theatre, place of amusement or entertainment, or other place where public exhibitions, games, contests or performances are held shall, if a price be charged for admission thereto, print on the face of each such ticket, or other evidence of the right of entry the price charged therefor by such person, firm or corporation.

§ 173. *Violations; Penalties.* Every person, firm or corporation who resells any such ticket or other evidence of right of entry or engages in the business of reselling any such ticket or other evidence of the right of entry, without first having procured the license prescribed and filing of a bond required by this article shall be guilty of a misdemeanor. Every person, firm or corporation who violates any provisions of this article shall be guilty of a misdemeanor.

§ 174. *Constitutionality of Article.* In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity or effect of the remaining provisions of the article.